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No.

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Pork Promotion, Research, and Consumer Information Act of 1985 (Pork Act), 7 U.S.C. 4801 *et seq.*, and the implementing Pork Promotion, Research, and Consumer Information Order (Pork Order), 7 C.F.R. Part 1230, violate the First Amendment insofar as they require pork producers to pay assessments for generic advertising with which they disagree.

2. Whether the district court erred in issuing a nationwide injunction against the collection of all assessments under the Pork Act, including those from pork producers who support the generic advertising and those used to fund activities other than generic advertising.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Ann Veneman, Secretary, United States Department of Agriculture; the United States Department of Agriculture, and the Cattlemen's Beef Promotion and Research Board. The respondents are:

Campaign For Family Farms
James Dale Joens
Richard Smith
Rhoda Perry
Lawrence Ginter
National Pork Producers Council
Peter Blauwikel
Bob Bloomer
High Lean Pork, Inc.
California Pork Producers
Kentucky Pork Producers
Indiana Pork Producers
New York Pork Producers
Ohio Pork Producers

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Agriculture, the United States Department of Agriculture (USDA), and the Administrator of the Agricultural Marketing Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 348 F.3d 157. The opinion of the district court (App., *infra*, 15a-55a) is reported at 229 F. Supp. 2d 772

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2003. On January 12, 2004, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 19, 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech.

2. The Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. 4801 *et seq.*, is reproduced at App., *infra*., 56a-91a.

3. The Pork Promotion, Research, and Consumer Information Order, 7 C.F.R. Part 1230, is reproduced in pertinent part at App., *infra*, 92a-121a.

STATEMENT

This case presents a First Amendment challenge to the Pork Promotion, Research, and Consumer Information Act of 1985 (Pork Act), 7 U.S.C. 4801 *et seq.*, which requires pork producers and importers to pay assessments to fund generic advertising and other activities conducted under the supervision of the Secretary of Agriculture by a statutorily created board whose members are appointed by the Secretary. The Sixth Circuit held that the Act violates the First Amendment rights of producers who object to contributing to the generic advertising, rejecting two grounds of defense of such statutes that this Court did not consider in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). The Sixth Circuit then affirmed a nationwide injunction directing the Secretary to cease collecting *all* assessments under the Act. The Eighth Circuit recently resolved substantially similar issues against the government in *Livestock Marketing*

Association v. *United States Department of Agriculture*, 335 F.3d 711 (2003), in which the government has filed a petition for a writ of certiorari. *Veneman* v. *Livestock Marketing Association*, No. 03-1164 (filed Feb. 13, 2004).

1. a. In 1985, Congress enacted the Pork Act to establish a coordinated program of promotion, research, and consumer information concerning pork and pork products. The program is carried out by the National Pork Board (Pork Board), an entity created by the Act, under the supervision of the Secretary. 7 U.S.C. 4808. The program is funded by an assessment (commonly referred to as a "checkoff") on all hogs sold in the United States as well as on all hogs and pork products imported into this country. 7 U.S.C. 4809.

In the Pork Act, Congress found that "the production of pork and pork products plays a significant role in the economy of the United States," that "pork and pork products must be available readily and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and that "the maintenance and expansion of existing markets, and development of new markets, for pork and pork products" are vital to the pork industry and "the general economy of the United States." 7 U.S.C. 4801(a)(2)-(4). Accordingly, Congress declared as its purpose "to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to—(A) strengthen the position of the pork industry in the marketplace; and (B) maintain, develop, and expand markets for pork and pork products." 7 U.S.C. 4801(b)(1).

The Pork Act directs the Secretary to promulgate an order implementing the program, 7 U.S.C. 4803; defines the terms "promotion," "research," and "consumer information," 7 U.S.C. 4802(2), (12), and (13); and specifies provisions that are required or permitted to be contained in the order, 7 U.S.C. 4806-4810. The Act provides for the order to remain in effect only if approved by a majority of pork producers voting in a referendum. 7 U.S.C. 4811. The Act also authorizes the Secretary to terminate the program if she determines that it is not effectuating its purpose, 7 U.S.C. 4812(a), and to conduct subsequent referenda on continuing the program at the request of at least 15% of pork producers, 7 U.S.C. 4812(b).

In 1986, the Secretary promulgated the Pork Promotion, Research, and Consumer Information Order (Pork Order), 7 C.F.R. Part 1230. In 1988, the Pork Order was approved by nearly 80% of pork producers voting in a referendum. App., *infra*, 4a.

b. The Pork Act and the Pork Order establish two entities to carry out the program. The National Pork Producers Delegate Body (Delegate Body) is composed of 167 members, including at least two from each pork-producing State and representatives of pork importers. The members, all of whom must themselves be pork producers or importers, are appointed by the Secretary based on nominations by state pork producer associations and recommendations by importers. 7 U.S.C. 4806(b); 7 C.F.R. 1230.30(a), 1230.33. The Delegate Body nominates pork producers and importers to serve on the Pork Board, recommends to the Secretary changes in the rate of assessments, and determines the percentage of assessments to be remitted to state associations for their own promotion, research, and con-

sumer information programs consistent with the Pork Act. 7 U.S.C. 4806(g) and (h); 7 C.F.R. 1230.39.[1]

The Pork Board consists of 15 pork producers and importers, all of whom are appointed by the Secretary. 7 U.S.C. 4808; 7 C.F.R. 1230.54. The principal responsibility of the Pork Board is to "develop * * * proposals for promotion, research, and consumer information plans and projects," which must be submitted to the Secretary for approval. 7 U.S.C. 4808(b)(1)(A) and (B); 7 C.F.R. 1230.17, 1230.58, 1230.60. All of those plans and projects must be "designed to strengthen the position of the pork industry in the marketplace and to maintain, develop, and expand domestic and foreign markets for pork and pork products." 7 C.F.R. 1230.60(a)(1). No plan or project may make any false or misleading statement concerning pork or a competing product, 7 U.S.C. 4809(d), 7 C.F.R. 1230.60(c), or refer to a private brand name without the Secretary's approval, 7 C.F.R. 1230.60(d). No assessments may be used to influence legislation. 7 U.S.C. 4809(e).

The Pork Board has used assessments to fund a variety of promotional activities, including generic advertising directed to consumers, such as the "Pork: The Other White Meat" campaign. C.A. App. 1888. Other promotional activities have included cooking contests involving chefs, the preparation of analyses to demonstrate pork's profit potential to retailers, the analysis of foreign markets, and the training of retailers, distributors, and food-service operators in pork marketing and presentation techniques. *Ibid.* Aside from promotional activities, the Pork Board has sponsored research on the safety, quality, and nutritional

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[1] In 2001, for example, state associations were allocated 18% of assessment funds. App., *infra*, 41a-42a.

value of pork, including studies on eliminating or controlling the spread of swine-borne diseases and foodborne pathogens, and has developed consumer information materials on pork safety, preparation, and nutritional value. *Id.* at 1888-1889.

All of the Pork Board's activities are subject to the control of the Secretary, which is exercised through the Agricultural Marketing Service. The Secretary exercises approval authority over the Pork Board's annual budget as well as over all of its proposed plans and projects. 7 U.S.C. 4808(b)(1)(B) and (2); 7 C.F.R. 1230.58(b), (d) and (e)(1). The Secretary also exercises approval authority over the budgets, plans, and projects of state pork producer associations for the use of their share of Pork Act assessments. 7 U.S.C. 4808(b)(2)(B); 7 C.F.R. 1230.58(e)(2); see 7 U.S.C. 4808(b)(3) ("No plan, project or budget [of the Pork Board or a state association] may become effective unless approved by the Secretary."). In practice, moreover, "the Department [of Agriculture] reviews each Pork Act advertisement before airing," whether the advertisement originated with the Pork Board or a state association, and has required revision of some advertisements. App., *infra*, 42a.

2. a. This case began as a challenge to the Secretary's decision to terminate the Pork Order in accordance with the outcome of a voluntary referendum. Ultimately, the Secretary entered into a settlement with the plaintiffs, under which she agreed not to terminate the Pork Order, but required certain changes in the operation of the program. See App., *infra*, 40a.[2]

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[2] The original plaintiffs have filed their own certiorari petition seeking review of the court of appeals' decision in this case. *Michigan Pork Producers Ass'n* v. *Campaign For Family Farms*, No.

Respondents Campaign For Family Farms and four individuals, who had intervened to support the termination of the Pork Order, then asserted various claims against the Secretary and the Administrator of the Agricultural Marketing Service. Among other things, they contend that the Pork Act and the Pork Order violate the First Amendment by assessing them for generic advertising and other activities with which they disagree. For example, respondents object to the Pork Board's generic advertising as promoting "lean pork," which they claim is produced under unsafe and inhumane conditions, and as not promoting what they perceive as the unique qualities of pork produced on family farms. See App., *infra*, 19a-21a.

b. The district court held on summary judgment that "the mandated system of Pork Act assessments is unconstitutional since it violates [respondents'] rights of free speech and association." App., *infra*, 51a. The court rejected the contention that generic advertising conducted under the Pork Act is government speech, which the government may require objecting persons to fund without violating their First Amendment rights. The court reasoned that, "[t]hough the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into 'government speech.'" *Id.* at 47a.

The district court then held that the assessment provisions of the Pork Act cannot be sustained under

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03-1043 (filed Jan. 20, 2004). Although those parties are also respondents with respect to the government's petition in this case, this petition uses the term respondents to refer to Campaign For Family Farms and the other defendants/cross-plaintiffs who challenged the constitutionality of the Pork Act below.

the analysis applied in this Court's two previous cases involving generic advertising programs for agricultural products. The court reasoned that the Pork Act program more closely resembles the Mushroom Act program, which was held not to satisfy that analysis in *United Foods*, 533 U.S. at 412-416, than it does the tree fruit program that was upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). App., *infra*, 50a. The court did not analyze the Pork Act assessments under the intermediate scrutiny standard articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). See App., *infra*, 48a.

As a remedy, the district court declared the Pork Act unconstitutional and entered a nationwide injunction directing the Secretary and the Administrator "to cease the collection of assessments under the Pork Act and to cease the operation of the Pork Check-off Program." App., *infra*, 53a, 55a. The court refused to limit the injunction to assessments against the objecting parties in this case. *Id.* at 52a. And, although the court found that only $29.4 million of the Pork Board's $57.5 million budget for 2001 was designated for "demand enhancement" activities such as advertising (*id.* at 41a), the court refused to limit the injunction to the portion of assessments used to fund advertising and similar expressive activities. *Id.* at 52a-53a.

3. The Sixth Circuit affirmed. App., *infra*, 1a-14a.

The court of appeals, like the district court, held that generic advertising conducted by the Pork Board is not government speech. The court acknowledged that "the government may dictate the content and even the viewpoint of speech when the government itself is the speaker." App., *infra*, 7a. The court held, however, that the Pork Act involves not government speech, but

"wholly private" speech that the government merely "facilitate[s]." *Id.* at 9a. The court accorded significance to the facts that "the primary purpose of the Pork Act is to strengthen the market position of the pork industry and increase the domestic markets for pork and pork products"; that the Act's programs are funded by assessments against pork producers and importers rather than by general tax revenues; and that, although the Secretary retains ultimate control over the generic advertising conducted under the Act, the advertising is created by the Pork Board, which consists of pork producers, and entities under contract to the Board. *Id.* at 8a-9a.

The court of appeals also refused to hold that the Pork Act provides for permissible regulation of commercial speech under the intermediate scrutiny analysis applied in cases such as *Central Hudson.* The court viewed the *Central Hudson* analysis as inapplicable because, in contrast to many laws to which that analysis has been applied, "[t]he Pork Act does not directly limit the ability of pork producers to express a message." App., *infra*, 12a. The court instead characterized the Pork Act as "compel[ling] [pork producers] to express a message with which they do not agree." *Ibid.*

Finally, having found that the Pork Act violates the First Amendment by assessing respondents for generic advertising and similar promotional activities, the court of appeals sustained the district court's nationwide injunction against the collection of all assessments under the Act. App., *infra*, 12a-14a. The court rejected the government's arguments that any relief should be confined to respondents themselves, as well as to the portion of the assessments used to fund generic advertising and similar activities. The court reasoned that, at least in the absence of a textual severability

provision, "[i]t would contort congressional intent" to preserve the Act except to the extent that it requires respondents or other persons to contribute to the costs of speech to which they object. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

The court of appeals has exercised "the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), striking down a central provision of a statute designed to protect the livelihood of pork producers and others in the pork industry, to provide information to consumers, and to strengthen the national economy. That holding is incorrect. The Pork Act is not a law "abridging the freedom of speech" under the First Amendment. The Pork Act promotes speech—by the government—using modest assessments from persons who have chosen to make their living in the pork industry. Respondents produce the very product that the government has chosen to promote in the Pork Act, and respondents are not constrained by the Pork Act from communicating their own messages.

In holding that the generic advertising conducted under the Pork Act is not government speech—a question expressly reserved in *United States* v. *United Foods*, 533 U.S. 405, 417 (2001)—the Sixth Circuit has called into question the government's ability to convey messages to the public. In also declining to sustain the Pork Act under the intermediate scrutiny generally applied to commercial speech regulations, the Sixth Circuit has rendered a decision that cannot be reconciled with the Third Circuit's decision in *United States* v. *Frame*, 885 F.3d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), which sustained the similar Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*,

under stricter scrutiny. And, in upholding a nationwide injunction against the collection of all assessments under the Pork Act, the Sixth Circuit has acted contrary to the principle that injunctions should be no broader than necessary to provide relief to the complaining parties.

The government has recently sought this Court's review of the Eighth Circuit's decision in *Livestock Marketing Association* v. *United States Department of Agriculture*, 335 F.3d 711 (2003), which presents questions virtually identical to those presented here in the context of the Beef Act. See *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164 (filed Feb. 13, 2004); see also *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Ass'n*, No. 03-1165 (filed Feb. 13, 2004). This petition should be held pending the disposition of the petitions in *Livestock Marketing Association*.

I. GENERIC ADVERTISING CONDUCTED UNDER THE PORK ACT IS GOVERNMENT SPEECH, WHICH IS NOT SUBJECT TO THE CONSTRAINTS OF THE FIRST AMENDMENT

For reasons more extensively explained in the government's certiorari petition in *Livestock Marketing Association* (at 12-24), statutes such as the Beef Act in that case and the Pork Act here involve programs of government speech. The generic advertising conducted under those Acts serves public purposes identified by Congress, is confined to a message specified by Congress, and is disseminated by a governmental entity that was created by Congress and is subject to the control of the Secretary of Agriculture. The First Amendment does not limit the government's ability to engage in speech, whether funded by general tax revenues or by "user fees" assessed against those, such as pork

producers here, who benefit most from the speech and who are members of an industry that Congress has chosen to protect. See, *e.g.*, *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000) (explaining that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties," even when the government will spend the funds so raised "for speech and other expression to advocate and defend its own policies").

A. Although this Court has not defined the precise contours of the government speech doctrine, the Court's cases suggest that the program is insulated from First Amendment challenge under that doctrine when (i) the government establishes a program to convey a specified message, (ii) in order to advance a public purpose, and (iii) retains ultimate editorial control over the message. See, *e.g.*, *Southworth*, 529 U.S. at 229 (suggesting that, if a state university established a program "to advance a particular message" of its own and remained "responsible for its content," the program would involve government speech). Under those criteria, the Pork Act, like the Beef Act in *Livestock Marketing Association*, is properly viewed as establishing a program of government speech.

First, Congress directed the creation of the program at issue here. Congress identified several public purposes that were to be served by the Pork Act: advancing "the welfare of pork producers" and others in the pork industry, stabilizing "the general economy of the United States," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 4801(a)(3) and (4). Congress specified the activities that could be conducted under the program—namely, "promotion, research, and consumer informa-

tion," 7 U.S.C. 4801(b)(1)—as well as the content of the message to be conveyed through those activities. In particular, through its definition of the term "promotion," Congress made clear that advertising and other promotional activities conducted under the Pork Act are to be directed solely to "present[ing] a favorable image for porcine animals, pork, or pork products to the public with the intent of improving the competitive position and stimulating sales of porcine animals, pork, or pork products." 7 U.S.C. 4802(12). Congress prohibited the use of any funds collected under the Pork Act to make "a false or misleading claim on behalf of pork or a pork product" or "a false or misleading statement with respect to an attribute or use of a competing product," or "for the purpose of influencing legislation." 7 U.S.C. 4809(d) and (e).

Second, Congress created a governmental entity—the Pork Board—to carry out the Pork Act's program. Congress specified the composition of the Pork Board, and provided for appointment of its members by the Secretary. See 7 U.S.C. 4808(a); see also 7 U.S.C. 4806(a) and (b) (Delegate Body). Congress defined the powers and duties of the Pork Board. See 7 U.S.C. 4808(b); see also 7 U.S.C. 4806(g) and (h) (Delegate Body). And Congress specified the circumstances (aside from repeal of the Pork Act itself) in which the Pork Board would be required to cease operations. 7 U.S.C. 4812(a) and (b). Cf. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes

of the First Amendment" when it restricts the speech of others).

Third, Congress provided that a politically accountable official, the Secretary, would exercise control over the advertising and other activities conducted by the Pork Board. The Secretary has approval authority over the annual budget proposed by the Pork Board for the use of assessment revenues, 7 U.S.C. 4808(b)(2); 7 C.F.R. 1230.58(e)(1), as well as over all of its plans and projects, 7 U.S.C. 4808(b)(1)(A) and (B); 7 C.F.R. 1230.58(d); 7 C.F.R. 1230.60(a). As noted above, the Secretary appoints all members of the Pork Board, see 7 U.S.C. 4808(a), and may remove any member for cause, see 7 C.F.R. 1230.55(b). See also *Bowsher* v. *Synar*, 478 U.S. 714, 726-727, 734 (1986) (noting significant control exercised through appointment and removal power). In fact, the Secretary, through USDA's Agricultural Marketing Service (AMS), exercises substantial control over the message conveyed by the Pork Board, as well as the state associations that receive assessment funds. See, *e.g.*, C.A. App. 1773-1884 (Declaration of Barry Carpenter, Deputy Administrator, Livestock and Seed Program, AMS, with exhibits).

Accordingly, because Congress enacted the Pork Act to serve public purposes, directed the message to be disseminated, created a governmental entity to disseminate it, and required the Secretary's continuing control over that entity, the Pork Act is properly understood as creating a program of government speech. A person does not have any First Amendment right to avoid taxes or other exactions to fund government speech. See *Southworth*, 529 U.S. at 229.

B. In concluding that the generic advertising conducted under the Pork Act is not government speech, the Sixth Circuit accorded significance to the facts that

the Act is designed to strengthen a particular industry; that the generic advertising and other expressive activities conducted under the Act are funded by assessments against persons in that industry; and that the speech is carried out by an entity whose members, while appointed by the Secretary, are drawn from that industry. See App., *infra*, 8a-9a. None of those facts renders the government speech doctrine inapplicable.

The welfare of a particular industry is, contrary to the court of appeals' suggestion, an appropriate subject of governmental concern. As Congress found in enacting the Pork Act, "the production of pork and pork products plays a significant role in the economy of the United States," thereby making the maintenance and expansion of markets for pork "vital to * * * the general economy," as well as to the many persons who participate in the pork industry. 7 U.S.C. 4801(a)(2) and (4).

The government is entitled to fund its speech through whatever means it considers most appropriate, and thus is not limited, as the court of appeals supposed, solely to general tax revenues. Congress consequently may impose the costs of government speech on participants in the industry that Congress has chosen to promote, on the understanding that those persons would "most directly reap the benefits of" the speech. 7 U.S.C. 7401(b)(2) (making findings with respect to generic advertising programs, including the pork program). The assessments at issue here thus are a species of "user fees," which this Court has viewed as a permissible means of funding many government activities. See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-62 (1989); *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 461-462 (1988); *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941).

Furthermore, the government is entitled to speak through whatever public or private entity it considers most suited to the task. See, *e.g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (recognizing that the government speech doctrine applies when the government "disburses public funds to private entities to convey a governmental message"); *Rust* v. *Sullian*, 500 U.S. 173, 192-193 (1991). The government thus may choose to speak through a congressionally created body, which is composed entirely of members who are appointed and removable by the Secretary, and which acts under the Secretary's ongoing supervision and control. It is immaterial that the members of that body are themselves pork producers and importers.

C. Although three courts of appeals have refused to sustain the Pork Act or the Beef Act under the government speech doctrine, those courts did not rely on any consistent rationale. (A fourth case, in which the district court sustained the Beef Act under that doctrine, is currently before the Ninth Circuit. *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1129-1140 (D. Mont. 2002), appeal pending, No. 02-36140.). Moreover, in the first of those cases, the Third Circuit acknowledged that "the issue [is] a close one," and that there are "sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute 'government speech.'" *Frame*, 885 F.3d at 1131-1132. Because the various grounds on which the courts of appeals relied in these cases are erroneous for the reasons stated above and in the government's petition in *Livestock Marketing Association* (at 18-22), this Court's review is warranted.

The question whether the government speech doctrine defeats First Amendment challenges to assess-

ments for generic advertising programs under statutes such as the Pork Act is an important one for American agriculture and American consumers. Indeed, in *United Foods*, the Court expressly left unresolved the question whether the generic advertising program at issue there could be sustained as one involving government speech. See 533 U.S. at 416-417.

In addition to the generic advertising programs for beef and pork, Congress has authorized, and the Secretary has implemented, similar programs for a number of other agricultural commodities. See, *e.g.*, 7 U.S.C. 2101 *et seq.* (cotton); 7 U.S.C. 2611 *et seq.* (potatoes); 7 U.S.C. 2701 *et seq.* (eggs); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 6401 *et seq.* (fluid milk); Pet. 23 n.6, *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164. Moreover, Congress has enacted a statute, 7 U.S.C. 7411 *et seq.*, that authorizes marketing programs for any agricultural commodity, under which generic advertising programs have been established for such products as peanuts, 7 C.F.R. Part 1216; blueberries, 7 C.F.R. Part 1218, and lamb, 7 C.F.R. Part 1280. Several States have also established their own commodity marketing programs, some of which may resemble the pork program at issue here and the beef program in *Livestock Marketing Association.*

II. THE ASSESSMENT PROVISIONS OF THE PORK ACT ARE CONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY APPLICABLE TO REGULATIONS OF COMMERCIAL SPEECH

Aside from the government speech question, the Sixth Circuit also erred, as did the Eighth Circuit in *Livestock Marketing Association*, in refusing to sustain the assessment provisions at issue under the intermediate scrutiny standard articulated in *Central Hud-*

son Gas & Electric Corp. v. *Public Service Comm'n*, 447 U.S. 557 (1980), for regulations of commercial speech. These decisions, which themselves diverge in their reasoning, are inconsistent with the Third Circuit's holding in *Frame* sustaining the Beef Act under stricter scrutiny. See *Frame*, 885 F.2d at 1134-1137.

Under *Central Hudson*, a regulation of commercial speech will be upheld against a First Amendment challenge if the regulation (1) promotes a "substantial" governmental interest, (2) "directly advances the governmental interest asserted," and (3) is "not more extensive than is necessary to serve that interest." 447 U.S. at 566; see *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989) (explaining that the *Central Hudson* standard requires a legislature not to employ "the least restrictive means" of regulation, but merely to achieve a "reasonable" fit by adopting regulations "in proportion to the interest served") (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

The Sixth Circuit refused even to apply the *Central Hudson* analysis in this case, reasoning that *Central Hudson*'s "more lenient standard of review" is inapposite because the Pork Act does not "directly limit the ability of pork producers to express a message," but instead "compels them to express a message with which they do not agree." App., *infra*, 12a. As a threshold matter, the Sixth Circuit erred in characterizing the Pork Act as "forc[ing] [persons] to become a mouthpiece" for any message. *Ibid.* This Court has made clear that "[t]he use of assessments to pay for advertising does not require [persons subject to the assessments] to repeat an objectionable message out of their own mouths"; nor does such use of assessments "force [those persons] to respond to a hostile message when they would prefer to remain silent, or require them to

be publicly identified or associated with another's message." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997) (internal quotation marks and citations omitted). Moreover, the Sixth Circuit got it backwards in reasoning that a law, such as the one in *Central Hudson*, that prohibits a person from engaging in his own commercial speech, should be reviewed more leniently than a law, such as the Pork Act, that merely requires a person to fund a separate entity's (here, a government entity's) commercial speech. The Sixth Circuit's reasoning in that regard is inconsistent not only with the Third Circuit's reasoning in *Frame*, but also with the Eighth Circuit's reasoning in *Livestock Marketing Association*, which explicitly "disagree[d]" with the proposition that *Central Hudson* is inapplicable to statutes such as the Beef Act and the Pork Act. See 335 F.3d at 722.[3]

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[3] In *Wileman Brothers*, the United States urged the Court to evaluate the generic advertising program at issue under the analysis applied in cases, such as *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller* v. *State Bar*, 496 U.S. 1 (1990), involving compelled funding of speech, rather than under the analysis applied in cases, such as *Central Hudson*, involving regulations of commercial speech. See U.S. Br. at 18-34, *Wileman Brothers*, No. 95-1184. In the alternative, the United States urged that the program be upheld under the *Central Hudson* analysis. See *id.* at 34-48; cf. *United Foods*, 533 U.S. at 410 (noting that the government had not relied on *Central Hudson* in that case). In view of the Court's subsequent conclusion that the *Abood-Keller* analysis cannot provide a basis for sustaining programs of compelled funding exclusively or primarily for generic advertising and similar promotional activities, see *United Foods*, 533 U.S. at 415-416, the *Central Hudson* analysis, which typically has been applied to laws directed exclusively at speech, provides an alternative basis for sustaining such programs.

Like the Beef Act at issue in *Frame* and *Livestock Marketing Association*, the Pork Act is constitutional under the *Central Hudson* analysis. The Pork Act advances "substantial" governmental interests specifically identified by Congress: enhancing "the welfare of pork producers" and other members of the pork industry, stabilizing "the general economy of the United States," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 4801(a)(3) and (4).

Moreover, the Pork Act—including its generic advertising funded by producer assessments—"directly advances" those interests. This Court has repeatedly recognized the "immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569; see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 557 (2001); *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993). The assessment provisions play an integral role in advancing the government's interests. Those provisions avoid saddling taxpayers with the costs of the program, which could undermine the very support for the pork industry that Congress sought to engender, and prevent "free-riders," who would "receiv[e] the benefits of the promotion and research program without sharing the cost." *Frame*, 885 F.2d at 1135; see *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (noting the government's "vital policy interest in * * * avoiding 'free riders'" in the collective bargaining context).

Nor is the Pork Act "more extensive than is necessary to serve" the governmental interests. *Central Hudson*, 447 U.S. at 566. It "impose[s] no restraint on the freedom of any producer to communicate any message to any audience," "do[es] not compel any person to engage in any actual or symbolic speech," and "do[es]

not compel the producers to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470; see 7 U.S.C. 4809(e) (prohibition on use of assessment revenues for political activity). It requires only that pork producers contribute financially to generic advertising and other activities designed to benefit the industry in which they have chosen to participate.

In sum, the Pork Act serves substantial governmental interests, is carefully tailored to serve those interests, and is ideologically neutral. Cf. *Frame*, 885 F.2d at 1137. The Sixth Circuit's refusal to sustain the Pork Act under intermediate First Amendment scrutiny is incorrect and inconsistent with both the holding of *Frame* and the reasoning of *Livestock Marketing Association*.

III. THE LOWER COURTS ERRED IN INVALIDING THE PORK ACT'S ASSESSMENT PROVISIONS IN THEIR ENTIRETY AND ENJOINING ANY FURTHER COLLECTION OF ASSESSMENTS NATIONWIDE

In this case, as in *Livestock Marketing Association*, the court of appeals further erred in affirming the sweeping relief ordered by the district court—here, the invalidation of the assessment provisions of the Pork Act in their entirety and the issuance of a nationwide injunction "to cease the collection of assessments under the Pork Act and to cease the operation of the Pork Check-off Program." App., *infra*, 55a; see *id.* at 12a-14a. Such relief improperly "invalidate[s] more of the statute than is necessary," *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987), and is "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*,

442 U.S. 682, 702 (1979); see *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) ("[A] federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (internal quotation marks omitted).

The First Amendment violation identified by the Sixth Circuit was confined to the government's requiring respondents (or their members) to share the costs of the generic advertising and similar promotional activities under the Pork Act.[4] The Sixth Circuit did not hold that the First Amendment was violated by the government's assessing *other* pork producers for generic advertising to which those other producers have *not* objected. Nor did the Sixth Circuit hold that the First Amendment was violated by the government's assessing even respondents themselves for activities, such as food safety and nutrition research, that do not involve advertising or similar expressive activity.

Consequently, the First Amendment, even as understood by the Sixth Circuit in this case, does not require the invalidation of the assessment provisions of the Pork Act in their entirety or the nationwide injunction against the collection of any further assessments under

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[4] Respondents have asserted that assessing them for *any* Pork Act activities—including research and other non-speech activities—violates their First Amendment freedoms of speech and association. Although the district court held that the Pork Act's assessment provisions violate respondents' "rights of free speech and association," App., *infra*, 51a, the district court confined its analysis to the use of assessments for generic advertising and similar promotional activities. The Sixth Circuit did not address any separate challenge, based on the First Amendment freedom of association, to requiring respondents to pay assessments for other activities.

the Act. As this Court has recognized, when an individual's assessment for a private entity is used in part to fund political speech to which he objects, the appropriate remedy is to reduce that individual's assessment "in the proportion that [the private entity's] political expenditures bear to [its] total * * * expenditures." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 240-241 (1977); see *Keller* v. *State Bar*, 496 U.S. 1, 17 (1990).

The court of appeals viewed the Pork Act as precluding a result that would allow the collection of assessments to continue (except from producers who object to paying the portion of the assessment used to fund generic advertising and similar promotional activities). The court reasoned that the Pork Act "has no 'severability clause'" and "is incapable of functioning independently" of any (assertedly) unconstitutional provisions. App., *infra*, 12a-13a. This Court has made clear, however, that "[i]n the absence of a severability clause, * * * Congress' silence is just that—silence—and does not raise a presumption against severability." *New York* v. *United States*, 505 U.S. 144, 186 (1992) (quoting *Alaska Airlines*, 480 U.S. at 686). The severability inquiry therefore turns on legislative intent: Would the Congress that enacted the Pork Act have intended its assessment provisions to survive if objecting producers were found to have a constitutional right to avoid the portion used for generic advertising and similar activities? Nothing in the Pork Act's text, history, or purposes compels the conclusion that Congress would have intended to preclude relief tailored to remedy that (perceived) constitutional defect, and would instead have preferred that the Pork Act be rendered wholly inoperative.

Although the court of appeals viewed such a construction as defeating the purpose of the Pork Act,

see App., *infra*, 13a-14a, that view is incorrect. The Pork Act authorizes a variety of activities to assist the pork industry—including, for example, research and education activities—that *all* producers still may constitutionally be compelled to fund under the decision below. The mere fact that generic advertising and similar promotional activities would have to be funded only by producers who do not object to them would not prevent Congress's objectives in the Pork Act from being substantially achieved. Even under the existing scheme, the Pork Board devoted approximately 18% of its 2001 budget to research and education projects, including research on swine-borne diseases, the nutritional value of pork, production practices, and new product development. C.A. App. 1889, 1939-1942 (Declaration of Hugh Dorminy, President, Pork Board, with exhibits); see *id.* at 1888 (observing that a substantial portion of promotional expenditures are for activities distinct from advertising, such as studying export market opportunities and training retailers, distributors, and food-service operators in marketing and presentation techniques). Especially at a time of increasing public concern about food safety and nutrition issues, there is no justification for the evisceration of the Pork Act ordered by the courts below.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Veneman* v. *Livestock Marketing Association*, No. 03-1164, and *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Association*, No. 03-1165, and then disposed of accordingly.

Respectfully submitted.

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FEBRUARY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 02-2337, 02-2338

MICHIGAN PORK PRODUCERS ASSOCIATION, INC., ET AL., PLAINTIFFS

v.

ANN M. VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS

Argued: Mar. 14, 2003
Decided and Filed: Oct. 22, 2003

Before: COLE, GILMAN, and BRIGHT, Circuit Judges.*

OPINION

COLE, Circuit Judge.

Michigan Pork Producers Association, Inc., et al. ("MPPA") and the Secretary of Agriculture (the "Secretary") (collectively "Appellants") appeal the grant of summary judgment to Appellees Campaign for Family Farms, et al. ("CFF"). The United States District

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* The Honorable Myron H. Bright, Senior Circuit Judge of the United States Court of Appeals for Eighth Circuit, sitting by designation.

Court for the Western District of Michigan declared the Pork Promotion, Research and Consumer Information Act (the "Pork Act"), 7 U.S.C. § 4801 *et seq.*, and the Pork Promotion Order issued thereunder, 7 C.F.R. § 1230, unconstitutional and issued an injunction terminating all activities under the Pork Act and the Pork Promotion Order. The Act mandates that pork producers and importers (collectively "pork producers") pay assessments, known as "checkoffs," to fund promotion, research, and consumer information to benefit the pork industry.

The district court held that requiring the payment of these assessments violates the First Amendment rights of pork producers by compelling them to subsidize speech with which they do not agree. Appellants argue that: (1) the assessments subsidize a government program that advances the government's policy of promoting pork consumption, and, therefore, are immune from First Amendment scrutiny; (2) even if not part of a government program, the assessments are not compelled speech; (3) the Pork Act program that requires the collection of assessments, is a lawful restraint on commercial speech; and (4) even if the use of assessments for promotion under the Pork Act violates the First Amendment, the injunction ordered by the district court is overly broad in that it eliminates funding for programs that are constitutional.

For the reasons stated below, we AFFIRM the grant of summary judgment by the district court.

I. BACKGROUND

As part of the Food Security Act of 1985, Congress enacted the Pork Act. The purpose of the Pork Act is to:

> [A]uthorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to—
>
> (A) strengthen the position of the pork industry in the marketplace; and
>
> (B) maintain, develop, and expand markets for pork and pork products.

7 U.S.C. § 4801(b)(1). The Pork Act provides for the creation of a National Pork Producers Delegate Body ("Delegate Body"). 7 U.S.C. § 4806. The Delegate Body—which determines the amount and distribution of the assessments—consists of pork producers, who are nominated by the state pork producers associations and appointed by the Secretary, and pork importers, who are appointed by the Secretary based on the amount of assessments collected from importers. 7 U.S.C. § 4806(b)(1). The Pork Act also provides for the creation of a 15-member National Pork Board ("the Board"), 7 U.S.C. § 4808(a)(1), whose nominees are chosen by the Delegate Body and appointed by the Secretary. The Board is to develop and implement programs that fulfill the statutory mandates of promotion, research, and the provision of consumer information. 7 U.S.C. § 4808(b)(1). Although the United States Department of Agriculture ("USDA") provides some oversight over the Board, its Executive Vice President

noted that it "is not to be considered as a governmental entity/agency or a government contractor." Moreover, the members of the Board receive no compensation from the government, and are reimbursed for expenses from the collected assessments. 7 U.S.C. § 4808(a)(1)(6).

Because the Pork Act explicitly states that its programs "shall be conducted at no cost to the Federal Government," 7 U.S.C. § 4801(b)(2), the Act provides for funding through mandatory assessments. 7 U.S.C. § 4809 *et seq.* In accordance with the provisions of the Pork Act, an initial Pork Promotion Order, establishing the Pork Checkoff Program, was issued by the Secretary in 1986. An initial referendum on the Pork Checkoff Program was held in 1988, and it was approved with the support of nearly eighty percent of pork producers. Payments are assessed against all producers of porcine animals that are sold or slaughtered for sale, and all importers of porcine animals, pork, or pork products.[1] 7 U.S.C. § 4809(a)(1). The Board receives all assessments, and distributes them according to formulas detailed in the Pork Act. Although most of the funds support generic advertising, some of the money is spent to promote specific brands of pork products.

CFF, a non-profit advocacy group consisting of a coalition of four family farm organizations as well as individual hog farmers, is devoted to "ensuring the continued existence of family farms, particularly hog farms." Since 1998, CFF's primary goal has been to end the Pork Checkoff Program. CFF believes that the

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[1] In 2002, the Farm Security and Rural Investment Act of 2002 was passed, exempting organic hog farmers from paying the assessments. Pub. L. No. 107-171, § 1(a), 116 Stat. 134 (2002).

advertising funded by the Pork Checkoff Program favors those who sell processed meats, misrepresents the safety and desirability of large commercial farming, and downplays the benefits of family farms. In May 1999, after CFF filed petitions with the USDA seeking a referendum on the termination of the Pork Checkoff Program, then-Secretary Glickman decided to conduct a voluntary, "fairness" referendum on the checkoff program's future.

On January 11, 2001, Secretary Glickman announced that a majority of individuals had voted to terminate the program, and that as a result, he would terminate it. MPPA filed suit the next day to enjoin the program's termination. *Mich. Pork Producers Ass'n, Inc. v. Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (W.D. Mich. 2001) ("*MPPA I*"). On January 19, 2001, the district court issued a temporary restraining order pending hearing of the preliminary injunction motion. *Id.* Between the restraining order and the scheduled hearing, newly-appointed Secretary of Agriculture Veneman decided to preserve the Pork Checkoff Program, albeit with the funds collected by the Pork Checkoff Program administered directly by the Board instead of by the NPPC.

On June 25, 2001, the Supreme Court in *United States v. United Foods*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001), invalidated—as contrary to the First Amendment's prohibition against compelled speech—the Mushroom Checkoff Program created by the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* (the "Mushroom Act"). Like the Pork Act, the Mushroom Act required producers and importers of mushrooms to pay assessments that were primarily used to fund generic

advertising that promoted the sale of mushrooms. CFF subsequently added to its complaint a First Amendment challenge to the Pork Act. *MPPA I*, 174 F. Supp. 2d at 639. On December 4, 2001, the district court upheld the legality of Secretary Veneman's decision to preserve the Pork Checkoff Program. *MPPA I*, 174 F. Supp. 2d at 643-44. The court explicitly stated, however, that its ruling had no effect on the other claims of the parties, including CFF's First Amendment challenges. *Id.* at 648.

CFF then voluntarily dismissed all of its remaining challenges to the Pork Checkoff Program, save for its First Amendment claims. *Mich. Pork Products v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 777 (W.D. Mich. 2002) ("*MPPA II*"). The parties filed cross-motions for summary judgment. On October 25, 2002, the district court granted CFF's summary judgment motion, holding that the First Amendment prohibited the Pork Checkoff Program and enjoining it in its entirety. *Id.* at 792. MPPA and the Secretary filed timely Notices of Appeal, and this Court subsequently granted a stay of the district court's injunction pending the appeal.

II. ANALYSIS

A. Standard of Review

We review the district court's grant of summary judgment *de novo*. *See Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001). Summary judgment is granted when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. Fed. R.

Civ. P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Standing

Plaintiffs have standing under Article III to challenge the Pork Act. MPPA challenges the standing of CFF, claiming that: (1) several named appellees lacked standing because they do not pay assessments under the Pork Act and are unaffected by these provisions of the Pork Act requiring such payments; and (2) CFF does not have standing as an association under the test articulated in *Hunt v. Wash. Apple Adver. Comm.*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). In its brief to this Court, however, MPPA concedes that "two individuals, Mr. Smith and Mr. Jones, had standing to pursue their claims." Since at least one appellee in this action has standing, there is no need to consider MPPA's standing challenges to the individual appellees or to CFF. *See, e.g. Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986) (explaining that if one plaintiff has standing, it is unnecessary to consider the issue of standing as to other plaintiffs in the action).

C. First Amendment Challenge

1. Governmental Speech

We first consider whether the subsidies generated under the Pork Act are properly analyzed as private speech or as governmental speech. The Supreme Court has made clear that the government may dictate the content and even the viewpoint of speech when the government itself is the speaker: "[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker. . . ." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541, 121 S. Ct.

1043, 149 L. Ed. 2d 63 (2001). But the Court has yet to consider whether programs similar in nature to the Pork Checkoff Program constitute governmental speech—the Court declined to do so in *United Foods* because the government had failed to raise the governmental speech argument in the court below. *United Foods*, 533 U.S. at 417, 121 S. Ct. 2334.

We conclude that the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government. First, the primary purpose of the Pork Act is to strengthen the market position of the pork industry and increase the domestic markets for pork and pork products. 7 U.S.C. § 4801. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 13, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990) (categorizing as private the speech of an organization created "not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession."). Second, unlike the typical scenario in which speech is considered governmental in nature, the programs' funding does not come from general tax revenues. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L. Ed. 2d 233 (1991); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994, 121 S.Ct. 1653, 149 L. Ed. 2d 636 (2001). The Pork Act's funding comes solely from mandatory assessments paid by pork producers; the Act specifically forbids the use of government funds for its operations, and the Secretary and her staff are reimbursed from the assessments for any time spent working on activities under the Pork Act. 7 C.F.R. § 1230.73(c)(4).

Third, the government exercises only limited oversight over the programs. *See United Foods*, 533 U.S. at 417, 121 S. Ct. 2334 (suggesting that merely *pro forma* government oversight over a promotional program counsels against classifying it as governmental speech). Only one USDA staff member is responsible for overseeing all of the duties relating to the Pork Checkoff Program, including attending all meetings of the Pork Board and reviewing all advertisements and communications it develops. The government itself does not propose or draft any of the advertisements. Indeed, the trademark for the most recognizable ad, "Pork. The Other White Meat," is owned by the NPPC, not the government. The Pork Board itself is comprised only of private pork producers, appointed by the Secretary based on nominations made by the private state pork producers associations—which themselves are run entirely by industry officials.

In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.

2. Compelled Speech

With its programs properly characterized as private speech, the constitutionality of the Pork Act turns on whether pork is more like mushrooms or more like peaches. *See* F.J. Dindinger, *Free Speech for Mushrooms but not Peaches: Economic Regulations after* United Foods, Inc., COLO. LAW. 61 (April 2002). In *United Foods*, the Supreme Court held that the Mushroom Act—which provided for mandatory assessments that were used primarily to fund the generic advertis-

ing of mushrooms—violated the First Amendment's prohibitions against compelled speech. *Id.* at 411, 121 S. Ct. 2334. However, in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997), the Supreme Court held that the Agricultural Marketing Agreement Act—which established mandatory assessments that funded a broad regulatory apparatus that included, as one of its many programs, promotional advertising of California tree fruit—did not constitute unlawful compelled speech.[2]

Because the Pork Act is nearly identical in purpose, structure, and implementation to the Mushroom Act, the Pork Act is unconstitutional under the analysis set forth in *United Foods*. The Pork Act mandates that:

> (3) Nothing in this chapter may be construed to—
>
> (A) permit or require the imposition of quality standards for pork or pork products;
>
> (B) provide for control of the production of pork or pork products; or
>
> (C) otherwise limit the right of an individual pork producer to produce pork and pork products.

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[2] The federal courts have yet to weigh in on many other agriculture-promoting programs, including those touting "The Incredible, Edible Egg"; "Ah . . . the Power of Cheese"; and "The Touch . . . the Feel of Cotton . . . the Fabric of Our Lives." See Note, *The Constitution—It's What's for Dinner*, 2 WYO. L. REV. 617, 638 (2002). Earlier this year, however, the Eighth Circuit invalidated, as unconstitutional compelled speech, the mandatory assessment program bearing the slogan "Beef—It's what's for Dinner." See *Livestock Mktg. Ass'n v. United States Dep't of Agric.*, 335 F.3d 711 (8th Cir.2003).

7 C.F.R. § 4801(b)(3). This scheme is a far cry from that upheld in *Glickman*, which—in addition to funding a promotional campaign—provided for regulated price, output, and quality, and also authorized joint research and development projects, inspections, and even standardized packaging. *Glickman*, 521 U.S. at 461, 117 S. Ct. 2130. With the express prohibition on this type of non-promotional regulation, the Pork Act serves but one purpose: promotion. This case is therefore governed by *United Foods*.

MPPA attempts to distinguish the Mushroom Act from the Pork Act, claiming that most of the funds collected by the former were used for generic advertising, whereas only 16 percent of the total expenses in the 2001 Budget for all the activities funded under the latter were used for generic, nationwide advertising. In fact, the record reflects that the majority of the Pork Act's funds support advertising and promotions. The 2001 Budget called for $29,388,491, or 51 percent of the total expenses, to be used under the category of "Demand Enhancement." *Id.* Expenditures in this area were budgeted as follows:

Demand Enhancement Programming	$2,816,000
Advertising	$8,825,000
Merchandise	$5,400,000
Foodservice	$3,697,000
Pork Information Bureau	$2,800,000
Foreign Market Development/ World Trade	$5,850,491

The district court also found that Pork Act programs providing for "education" and "research" were designed to further the Act's promotional goals. *MPAA II*, 229 F. Supp. 2d at 777. Thus, the use of the assessments to fund advertising under the Pork Act is prohibited by the First Amendment because the expression that CFF and its members must support "is not germane to a purpose related to an association independent from the speech itself." *United Foods*, 533 U.S. at 415-16, 121 S. Ct. 2334.

Finally, we find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by *Central Hudson*, and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise —that is compelled. See *Glickman*, 521 U.S. at 474 n.18 (questioning whether "the *Central Hudson* test, which involved restrictions on commercial speech, should govern a case involving the compelled funding of speech"). It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece.

3. Remedy

Finally, we conclude that the district court properly invalidated the Pork Act in its entirety. Because the Act has no "severability clause" providing for the preservation of those statutory provisions that comply with the Constitution, we must invalidate the entire statute if the "balance of the legislation is incapable of

functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987). The very basis for holding that the Act violates the First Amendment—that its assessment of fees to promote pork is the chief goal of the Act, which does not create a broader regulatory program—prevents us from preserving other parts of the statute. See *Livestock Mktg. Ass'n v. United States Dep't of Agric.*, 335 F.3d 711, 726 (8th Cir. 2003) ("[T]he fact that the 'principal object' of the Beef Act is the very part that makes it unconstitutional, (i.e., compelling funding of generic advertising) [means that] no remaining aspects of the Act can survive."). It would be paradoxical to conclude simultaneously that Congress sought only to promote pork and that Congress still intended the incidental provisions of the Act to operate independently.

Nor does *United Foods* instruct otherwise. Appellant contends that: (1) this Court's decision in that case invalidated only part of the Mushroom Act; and (2) the Supreme Court affirmed the decision of this Court in its entirety. This argument misunderstands both decisions. The lone sentence in this Court's decision upon which Appellants rely—which states that "[t]he portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional"—was part of the analysis that distinguished the Mushroom Act from the statute upheld in *Glickman*, and in its context is most fairly read only as a comparison of the two statutes. This reading is confirmed by the Supreme Court's discussion of the decision below, which states only that "the Sixth Circuit held this case is not controlled by *Glickman*." *United Foods*, 533 U.S. at 409, 121 S. Ct. 2334. Even more

illustrative is the Supreme Court's conclusion in *United Foods* that "[t]he only program the Government contends the compelled contributions serve is the very advertising scheme in question." *Id.* at 415, 121 S. Ct. 2334. The decision to invalidate the advertising provisions of the Mushroom Act by definition resulted in the invalidation of the entire statute.

It would contort congressional intent if we were to take a statute that seeks entirely to promote a particular product and then strain to preserve the purportedly non-promotional provisions of that very statute. And the Supreme Court does not require that we do so. The district court was correct in striking down the entire Pork Act.

III. CONCLUSION

For the reasons stated, we **AFFIRM** the grant of summary judgment by the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE W. D. MICHIGAN, SOUTHERN DIVISION

Case No. 1:01-CV-34

MICHIGAN PORK PRODUCERS, ET AL.,
PLAINTIFFS/INTERVENORS/CROSS-DEFENDANTS

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.,
DEFENDANTS/INTERVENORS/CROSS-PLAINTIFFS

v.

ANN VENEMAN, SECRETARY OF THE UNITED STATES
DEPARTMENT OF AGRICULTURE, ET AL.,
CROSS-DEFENDANTS

Oct. 25, 2002

OPINION

ENSLEN, District Judge.

"[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Thomas Jefferson, Virginia Act for Establishment of Religious Freedom (1786), codified at Va.Code Ann. § 57-1 (Miche 2002).

INTRODUCTION

This matter is before the Court on Defendants/ /Cross-Plaintiffs Campaign for Family Farms ("CFF") and its named members' (together "Cross-Plaintiffs")

Motion for Summary and Motion to Dismiss.[1] It is also before the Court on the Motions for Summary Judgment filed by Plaintiffs Michigan Pork Producers *et al*[2] and Defendants Secretary of Agriculture Ann Veneman and Agriculture Administrator A.J. Yates ("Governmental Defendants"). Related to the above Motions for Summary Judgment are Motions to Strike filed by both Plaintiffs and Governmental Defendants (together "Cross-Defendants").

Ignoring preliminary questions for the minute, fundamentally this case asks the question of whether the system of mandated assessments for generic pork advertising created as a result of the Pork Production, Research and Consumer Education Act of 1985, 7 U.S.C. § 4801 *et seq.*, ("Pork Act"), *i.e.*, an assessment of 45 cents on each $100 of pork per hog sold, violates objecting producers' First Amendment rights of free speech and association.[3] The pole stars guiding this decision are the 2001 decision of the *United States Supreme Court in United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001) and its 1997 decision in *Glickman v. Wileman Brothers*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997). For the reasons which follow, the Court determines

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[1] The named members are James Dale Joens, Richard Smith, Rhonda Perry and Lawrence Ginter collectively.

[2] The other named Plaintiffs include the National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, and Ohio Pork Producers.

[3] This is the current assessment rate under 7 C.F.R. § 1230.112. The Pork Act itself allows assessments of between 25 and 50 cents for $100 of pork sold as to each hog sold. 7 U.S.C. § 4809(b).

that the *United Foods* decision is the more pertinent precedent and that the Pork Act offends objecting producers' First Amendment rights of free speech and association.

PROCEDURAL BACKGROUND

This case began as a judicial challenge to a voluntary, "fairness" referendum of pork producers as to whether the Pork Order (the executive order authorizing the Pork Check-off Program ("Pork Program" or "Program") under the Pork Act) should continue. See *Michigan Pork Producers Association v. Campaign for Family Farms*, 174 F.Supp.2d 637 (W.D. Mich. 2001). The result of the previous, disputed "fairness" referendum announced on January 11, 2001, was that 15,951 producers disfavored the Program and 14,396 producers favored the Program. *Id.* at 639 Plaintiffs initially challenged both the counting of the votes and the legal basis for Program termination. Subsequent to the filing of the Complaint, the change in Presidential administrations brought a new Secretary of Agriculture, Ann Veneman, who settled with Plaintiffs by agreeing not to terminate the Program based on the referendum vote. *Id.* This settlement was subsequently upheld by the Court as within the discretion of the Secretary. *Id.* at 648.

Notwithstanding the determinations in the published decision, this lawsuit continued. Cross-Plaintiffs filed cross-claims against the Governmental Defendants and the Plaintiffs. The constitutional basis for the new cross-claims was the First Amendment protections for freedom of speech and association. The precedential basis for the cross-claims was the Supreme Court's decision in the *United Foods* case (as well as the decision below by the Sixth Circuit Court of Appeals,

United Foods, Inc. v. United States, 197 F.3d 221 (6th Cir. 1999), which the Supreme Court affirmed). The parties have now filed multiple dispositive motions as to such claims as well as Motions to Strike portions of the evidentiary materials. Given the abundance of briefing and the need for prompt resolution, the Court dispenses with oral argument as to the pending motions.

FACTUAL RECORD

CFF is an advocacy group composed of four subgroups, which are also community and public interest advocacy groups. Those groups are: the Land Stewardship Project; the Illinois Stewardship Alliance; Iowa Citizens for Community Improvement; and the Missouri Rural Crisis Center. (Perry Exhibit 1 at 5-7; Perry Exhibit 11 at 6-7.) Each of these organizations are compromised of individual members and each include substantial numbers of hog farmers. (Schultz Exhibit 6 at 40-44; King Exhibit 2 at 68, 70 & 79; Stokes Exhibit 26 at 58-61; Stokes Exhibit 27 at 159-64; Perry Exhibit 11 at 6-7, 22-23.) In addition to these subgroups, CFF has 540 individual members who are hog farmers. (Perry Exhibit 4 at 233-34.)

CFF's agricultural interests are to promote family farming as opposed to the vertical integration of agricultural production, *i.e.*, factory farms. Since 1998, CFF has pursued as a primary goal the termination of the Pork Program. CFF views the Pork Program as beneficial to factory farming but antithetical to the interests of its members, who are family farmers. (*See* Perry Exhibit 11 at 6-9; Perry Declaration at ¶¶ 4-5, 14 & 18.) Plaintiffs seek a declaration that the Pork Program is unconstitutional and an injunction preventing the operation of the Pork Program and the taking of mandatory assessments.

CFF's named members' particular objections are typical of CFF views. CFF members disagree with the generic advertising of pork, *i.e.*, the "Pork, the Other White Meat" advertising program paid for by use of the mandatory fees. CFF members assert that they raise hogs (animals), not pork (processed meat), and the Program supports a commodity they do not sell.[4] (Cross-Plaintiffs Brief, Dkt. No. 162, at 10.) They believe that this Program benefits packers and retailers to their detriment. (*See* Stokes Exhibit 12 at 1, stating that hog farmers' percentage of the revenue for each dollar of pork sold declined from 1996 to 2001 from 42.5 percent to 30.1 percent.) Cross-Plaintiffs also assert that generic advertising fails to promote the unique qualities and attributes of hogs raised on family farms. (Perry Declaration at ¶¶ 6, 7; Perry Exhibit 4 at 41-44; Joens Declaration at ¶¶ 13-14; Smith Declaration at ¶ 13.) Presumably, if Cross-Plaintiffs had control of their own advertising dollars, they might spend it in very different ways from a generic campaign. For example, a campaign to sell family farm products and to discourage consumption of mass produced pork. Cross-Plaintiffs also assert that the generic advertising promotes "lean pork" and that they are opposed to the production of excessively lean pork because of the unhealthy and inhumane conditions which they believe are connected with its production. (Perry Declaration ¶¶ 6-7; Smith Declaration ¶ 13; Schultz Exhibit 6 at 60-61.) Additionally, some CFF members disagree with the generic advertising because they believe it misrepresents pork as a white meat and discourages the

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[4] The implication being that the Pork Program supports pork processors whose advertising and financial interests are diverse from family hog farmers.

sale of bacon and ham. (Cross-Plaintiffs Brief, Dkt. No. 162, at 11.)

Additionally, the Pork Program supports some name brand advertising of large processors such as Hormel or Smithfield. CFF includes members such as Perry and Joens who have chosen to slaughter their own hogs in order to market hogs raised in non-factory conditions. These members strongly oppose name brand advertising of products sold by their competitors. (*Id.* at 11-12; Perry Declaration at ¶ 8; Schultz Exhibit 6 at 68.) Cross-Defendants have admitted that about $800,000 of funds are used in branded ads, but have further clarified that the branded ads assert generic messages (i.e., "Pork, the Other White Meat"). (Hugh Dorminy Declaration at ¶¶ 26-27; Plaintiffs' Opposition, Dkt. No. 198, at 16.)

Pork Program funds also support certain "education" programs. Cross-Plaintiffs view these "education" programs as misinformation programs in that they propagate the view that large commercial farming operations are humane. Defendant Joens has stated:

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large corporate confinement facilities.

(Joens Declaration at ¶ 7.) Defendant Smith has similarly stated:

> These programs are for people that work in the corporate hog factories that have never seen a hog before they went to work for a huge conglomerate.

> I object because this is independent producer money going to a program that is focused on corporate hog factories and not the independent producers who believe in animal husbandry and who have been handling hogs humanely for years. . . .

(Smith Declaration ¶ 10.) Some CFF members also object to funding of "education" because they adamantly oppose this method of raising livestock. (Perry Declaration ¶¶ 7-9, 11-13 & 15.)

Another portion of the allocations are dedicated to research, especially research as to the use of antibiotics. The Pork Board has apparently funded expenditures called "Antimicrobial Resistance and Alternatives Research." Some CFF members take issue with the research and believe that positions taken by the Pork Board as to antibiotics jeopardize the safe consumption of pork. (Perry Declaration at ¶ 15; Smith Declaration at ¶ 10; Schultz Declaration at ¶ 8.) This research is also apparently related to the "education" goals of the Pork Board—*i.e.*, communications to producers to convince them to adopt practices favored by the Pork Board. For 2002, $454,000 of the Pork Program budget was allocated to education. (Perry Exhibit 3.)

CFF members also object to forced association with both the Pork Board, the National Producers Council (the Iowan not-for-profit corporation that until recently has done advertising for the Pork Board) and the state pork associations who are allocated 18 percent of the assessments for their own advertising. CFF members are "forced" to associate with the Pork Board in that they are required to obtain a "Pork Quality Assurance" certification to sell hogs, which certification bears the name of the National Pork Board. (Smith Declaration at ¶ 7; Joens Declaration at ¶ 12; Smith Exhibit 2; Joens

Exhibit 1.) Until 2002, the card also associated producers with the Producers Council. (Smith Exhibit 2.) State pork associations apparently are involved in a variety of marketing activities and lobbying efforts. Cross-Plaintiffs' statements imply that they have strong philosophical and commercial objections to these efforts, similar to their objections to generic Pork Act advertising.

As is clear from the Declarations and Exhibits filed by Cross-Plaintiffs, CFF and its members principally oppose the Pork Program for a variety of reasons. Though those reasons are not always consistent nor persuasive, they are, nevertheless, Cross-Plaintiffs' sincere and strongly-held views.

On the other side of the ledger, Plaintiffs and Government Defendants have made clear the economy value of the Pork Program to the agricultural economy. According to an impressive expert study of a team of researchers at Texas A & M University's Agriculture Department, the Pork Program has a very positive economic effect on pork producers. (See Deposition of Oral Capps, Ph.D. and Deposition Exhibits 110 & 112.) This study was commissioned in 1998, significantly before the filing of this suit, to justify the original Program. One of the conclusions of the study is that each dollar of assessments generates $4.79 for pork producers. (Capps' Deposition Exhibit 112 at ¶ 3.) Further, it is estimated that "demand enhancement" (principally advertising) generates $15.26 per dollar invested. (*Id.* at ¶ 4-5.) To put it somewhat differently, on the sale of the typical hog, the producer earns an additional $1.17 because of the effect of advertising and marketing on demand. (*Id.*) The study also indicated that a mandatory program was necessary because a

system of voluntary payments would suffer from "free riders"—*i.e.*, producers who did not want to contribute, but who wanted to benefit from a program. (*Id.* at ¶ 2.) Also, a voluntary program would not generate sufficient revenue. (*Id.*) Prior to any mandatory program, a voluntary program had operated and generated only $9 million dollars of assessments per year. (Plaintiffs' Reply, Dkt. No. 215, at 16, citing S. Rep. 99-145.)

CFF's economic expert, Dr. Siegert, disagreed with Dr. Capps' conclusions to a limited degree. Dr. Siegert suggested that a different discount rate should be used to assess the economic effects and that, applying the different discount rate, the use of assessments generates only $2.63 for pork producers per dollar of assessments. Dr. Siegert also expressed a criticism of the report because he felt that there were some "free riders" of the Pork Program—*i.e.*, that the Program benefits wholesalers and processors without making them contribute to the cost. However, Dr. Siegert essentially admitted that due to the complexity of "tax incidence" it was difficult to assess the accuracy of this criticism. (Siegert Deposition at 102-104.)

Notwithstanding such data, CFF conducted its own study of 500 hog farmers in September 2001. (Stokes Supplemental Declaration Exhibit 44.) Fifty-seven percent of those surveyed believed that large producers received the greatest benefits from the Program; only 38 percent of those surveyed believed that the Program benefitted all producers equally. (*Id.*) These survey results are consistent with the referendum vote announced by Secretary Glickman in January 2001. The referendum vote itself evidences such widespread discontent with the Pork Program that it is bound to include many individuals who, like Cross-Plaintiffs,

strongly disagree with Pork Program messages, and many others who simply believe that they can choose more economically effective uses of the funds assessed than can the functionaries of the Department of Agriculture.

STANDARD FOR SUMMARY JUDGMENT

As to the motions now before the Court, each of these motions turns on the standards set forth in Federal Rule of Civil Procedure 56.[5] Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The initial burden is on the movant to specify the basis upon which summary judgment should be granted and to identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-movant to come forward with specific facts, supported by the evidence in the record, upon which a trier of fact could find there to be a genuine fact issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If, after adequate time for discovery on material matters, the non-movant fails to make a showing sufficient to establish the existence of a material disputed fact, summary judgment is

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[5] One of the motions requested dismissal under Rule 12 as opposed to summary judgment. Nevertheless, because the Motion to Dismiss raised matters outside the pleadings, it is properly analyzed under Rule 56. *See* Rule 12(b). Furthermore, the Motions to Strike raised issues pertinent to the Rule 56(e) requirements, which are discussed herein.

appropriate. *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. 2548.

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions. *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. 2548 (quoting *Anderson*, 477 U.S. at 255, 106 S. Ct. 2505). The factual record presented must be interpreted in a light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Rule 56 limits the materials the Court may consider in deciding a motion under the rule: "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995) (quoting Federal Rule of Civil Procedure 56(c)). Moreover, affidavits must meet certain requirements:

> [A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed. R. Civ. P. 56(e). The Sixth Circuit has held "that documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded." *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993). Thus, in resolving a Rule 56 motion, the Court should not con-

sider unsworn or uncertified documents, *id.*, unsworn statements, *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968-969 (6th Cir. 1991), inadmissible expert testimony, *North American Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1280 (6th Cir. 1997), or hearsay evidence, *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996); *Wiley v. United States*, 20 F.3d 222, 225-226 (6th Cir. 1994).

LEGAL ANALYSIS

Motions to Strike

Cross-Defendants have filed Motions to Strike portions of the testimony of CFF's members. This testimony is obviously important since it provides a basis for standing and a basis for CFF's claims that its members oppose the use of Pork Program funds.

Governmental Defendants urge that CFF's members' objections to the Program are unreliable in that the members did not disclose the nature of their objections to particular Program expenditures in depositions predating their declarations. While it is true that it is improper for a witness to contradict deposition testimony by an affidavit or declaration for the purpose of avoiding summary judgment, see *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir. 1986), this rule does not apply to a witness who is simply clarifying or expanding upon previous testimony. *Messick v. Horizon Industries*, Inc., 62 F.3d 1227, 1231 (9th Cir. 1995). In this case, the challenge is unpersuasive since the Court does not recognize any "inconsistency." CFF's members are hog farmers. They have evidently objected to the taking and use of Pork Program funds for some time. Nevertheless, those members continue to investigate the objects of the Program and continue

to find different aspects of the Program which are disagreeable to them. The fact that after their depositions they could articulate more and specific reasons for disagreeing with particular Pork Program messages (while in the process of continual research) is not a reason to pretend that they do not have serious objections to Pork Act spending. Rather, it seems to be substantial proof that CFF members are thinking persons open to continually analyzing their views and that in the course of analyzing their views CFF members have found additional reasons for objecting to Pork Act spending. None of these arguments gives the Court any pause in concluding that CFF's members have sincerely held and strong beliefs which cause them revulsion to Pork Act speech and association.

As for Plaintiffs' Motion to Strike, the Motion provides a specific sentence by sentence review of each of the declarations. The Motion objects to many exhibits based on lack of foundation, which is a poor objection in the context of Rule 56(e). Rule 56(e) is for most a "personal knowledge" requirement, which is unrelated to the traditional evidentiary objection for lack of foundation. No persuasive legal authority is cited for this argument.

Plaintiffs' Motion does tender objections to many exhibits based on lack of personal knowledge and hearsay. While these are valid objections, legally speaking, they are inappropriate in this instance. The statement of CFF members' objections (and the reasons for those objections) was not intended to prove the truth of their statements about the state of the agricultural economy and pork promotions as a whole. It was only offered to prove that they have sincerely-held beliefs at odds with the use of Pork Act funds and particular Pork Program

expenditures. Thus, hearsay and personal knowledge objections are not appropriate as to such testimony. Furthermore, the objections to the testimony (to the extent the testimony was intended to establish facts about the agricultural economy outside the speaker's direct knowledge) are generally not material. The point of this legal analysis is not to decide what is the best form of pork advertising, but rather to determine whether named Plaintiffs have strongly held beliefs at odds with the use of Pork Act assessments to fund generic advertising and other public expression contemplated by the Act.[6] Further, it makes little sense to analyze Plaintiffs' Declarations to discover how the Pork Program operates since the operation of the Pork Program is a matter which is not in significant question given the statutory, administrative and public record of its operations. Therefore, both Motions to Strike will be denied.[7]

Standing and Capacity

Cross-Defendants argue that CFF and its named members lack standing and that CFF lacks capacity to sue. Article III of the United States Constitution, of course, limits the exercise of judicial power to actual cases and controversies. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The constitutional requirements for standing are also supplemented by the "prudential" requirements for standing—which ask whether pruden-

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[6] This is not to say that the Court has disregarded statements by CFF declarants which were within their personal knowledge as hog producers.

[7] The Court also adopts by reference Cross-Plaintiffs' responses to specific objections, contained at pages 7-14 of Cross-Plaintiffs' Opposition, Dkt. No. 219.

tial concerns should limit a federal court's exercise of jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Prudential considerations include whether a party is asserting a generalized grievance that is not peculiar to the party; whether the party is asserting the rights of third parties; and whether the injury alleged is outside of the "zone of interest" protected by the law creating the cause of action. *Cannon v. J.C. Bradford & Co.*, 277 F.3d 838, 853 (6th Cir. 2002). Rule 17 also imposes a "real party"/capacity requirement on organizational parties, which is related to the standing requirement. The burden of proof and persuasion as to standing and capacity is upon Cross- Plaintiffs. See *Lujan*, 504 U.S. at 561, 112 S. Ct. 2130.

To begin with the capacity question, Rule 17(a) requires that actions be prosecuted and defended by a "real party in interest." Rule 17(c) allows suit by an unincorporated association to the same extent as recognized by the laws of the forum state. Rule 17 is not intended to limit capacity beyond any state law controlling association requirements nor beyond the usual rules for standing. In this case, based on the argument, Cross- Defendants' concerns as to CFF appear for the most part to relate to standing and not to any particular requirements of state law. Governmental Defendants have argued that CFF lacks capacity because they are a "campaign" and not an "association." However, this argument is not made in the context of any state law requirements for capacity. It is made without reference to any controlling legal definitions distinguishing a "campaign" and an "unincorporated association." It is also made in the face of precedent which supports a view that association

capacity be freely granted to associations meeting standing requirements.

Cross-Defendants' capacity argument is based on such cases as *Brown v. Fifth Judicial District Drug Task Force*, 255 F.3d 475, 476 (8th Cir. 2001), a case holding that a drug task force lacks standing to assert rights on behalf of the constituent law enforcement entities, and *Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 109-10 (S.D. N.Y. 1992), rejecting capacity of a business syndicate. These precedents are inapposite. As to the Brown case, an important and much different interest is served in the context of criminal tasks forces by limiting capacity to the constituent recognized legal entities forming the task force. This assures voters that the entities represented before Court are legally recognized and politically accountable to voters for the litigation choices made (as opposed to task force members who may have no allegiance to the voters of any given entity). Likewise, as to the *Roby* case, different interests are at play. A business syndicate is not a recognized legal entity and should not advocate financial interests contrary to those of syndicate members who are recognized legal entities. These precedents simply do not apply to unincorporated associations engaged in political and social advocacy, which often are fluid, created for the purpose of advocacy upon a single issue, and lacking in organization detail.[8]

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[8] Governmental Defendants have also cited the cases of *McKinney v. United States Dept. of Treasury*, 799 F.2d 1544, 1553 (Fed. Cir. 1986) and *Minnesota Public Interest Research Group v. Selective Service System*, 557 F. Supp. 925 (D. Minn. 1983). These cases are about standing under the Hunt factors; they do not establish a separate "capacity" test for unincorporated associations.

Standing requirements for unincorporated associations were explained by the Supreme Court in its decision in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). According to *Hunt*, the requirements for an unincorporated association to have standing to sue are: (1) the individual organization members would have standing in their own rights; (2) the interests sought to be protected are germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested require participation by individual members. *Id.*

In this case, there is sworn unrebutted testimony that CFF includes 540 members, who oppose mandatory assessments on ongoing hog sales. (Schultz Exhibit 6 at 40-44; King Exhibit 2 at 68, 70, 76 & 79; Stokes Exhibit 26 at 58-61; Stokes Exhibit 27 at 159-64; Perry Exhibit 11 at 6-7, 22-23.) According to CFF's named members, these unnamed members are or were hog farmers subject to the assessments. (Perry Exhibit 4 at 233-34.) These individual members have been polled and contacted by telephone surveys and mailings to ascertain their opposition to the use of Pork Program funds. (Perry Exhibit 11 at 19-23.) This suit was brought only after CFF had received objections to the Pork Program from hundreds of its members. (Schultz Declaration at 4; King Declaration at 4.) This evidence and the lack of any real opposition to it establishes as a matter of law that the individual organization members would have standing to sue in their own right.

One point related to the first prong of the *Hunt* test is the extent of discovery as to CFF's membership. CFF has declined discovery requests for its membership list. It has done so based on federal case law

which recognizes a right of an association to not disclose its membership because such disclosure is likely to erode membership. As was recognized by the Supreme Court in *Bates v. City of Little Rock*, 361 U.S. 516, 523, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960), "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective . . . restraint on freedom of association." See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 498, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975); *Familias Unidas v. Briscoe*, 544 F.2d 182, 192 (5th Cir. 1976) (holding that membership information could be compelled through a discovery request); cf. *Marshall v. Bramer*, 828 F.2d 355, 359-60 (6th Cir. 1987) (permitting sealed discovery as to membership of violent, white supremacist group for the purpose of prosecution of an arson suit).[9]

While the Court agrees in principle with Cross-Defendants that it must balance the need for discovery versus the First Amendment interests protected by non-disclosure, in this case the balance falls decidedly on the side of non- disclosure. The members are all persons subject to federal regulation by the Department of Agriculture. Whether true or not, those members are likely to have substantial fears that disclosure of their names to the Department of Agriculture could result in their disparate treatment. Under this scenario, disclosures of those names would be corrosive

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[9] The Marshall decision is distinguishable in that in such suit there was a much stronger need for the discovery; there was a lesser First Amendment interest at stake in that the defendants were engaged in non-protected and criminal activities in addition to protected activities; and the option of sealed discovery was a workable solution.

to the individuals' rights of association so as to be forbidden by the First Amendment and by prudential concerns. It would make little sense to require such discovery in the context of a First Amendment speech and association challenge. If this were done, the working of the discovery mechanisms would impose an injury on Cross-Plaintiffs tantamount to the rights sought to be vindicated in the suit.

While it is also true that Governmental Defendants have cited cases for the proposition that associational standing should not be granted when opponents have not had a fair opportunity to discover facts concerning the standing of individual members, *see, e.g., American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 51 (D.D.C. 1998), the focus of those cases is whether enough information was supplied to *one or more* identified members so as to give the district court a proper basis for finding of standing. In this case, Cross-Plaintiffs have identified four individual members who have been subjected to grueling discovery and as to whom a finding of standing is clearly required. The law does not require that CFF impose these burdens on all of its membership as a condition for suit.

It further bears mention that this discovery issue was not properly raised in the context of these motions. If Cross-Defendants were owed discovery, the proper course was to, long ago, file a motion to compel discovery under Rule 37. If they objected to a discovery order by a magistrate judge, the proper course was to appeal it as clearly erroneous under Rule 72(a).[10] In the

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[10] It is also possible to contest this issue through the filing of a persuasive Rule 56(f) affidavit . It does not appear that this procedure was followed in this case and, even if it had been made, it was

absence of any timely pursuit of the information through a proper procedural mechanism, the Court must view such complaints for what they are—chaff fit for the furnace.

In terms of the other prongs of the *Hunt* test, they too are satisfied. The interests sought to be protected in this suit (speech and association interests of family farmers) are germane to the interests of CFF-which is an acknowledged umbrella group for family farm organizations and individual farmers which has had since 1998 an objective to challenge the Pork Program. Also, individual members need not participate to obtain the very general relief sought—*i.e.*, a declaration of unconstitutionality and an injunction against future operation of the Program. Therefore, it is clear that CFF has capacity to sue. Since CFF has capacity to sue, the greatest part to the challenge to standing (against CFF) is not well taken.

Another general argument made by Plaintiffs is that some or all of the Cross-Plaintiffs lack standing because they receive federal producer subsidies as hog producers which are greater in value than the amount of assessments paid. While the premise may be true, it is irrelevant. Not a single case has been cited for the proposition that a producer does not have standing to object to mandatory assessments because of a separate program of farm subsidies. The lack of precedent is telling in that the end of this argument is truly pernicious. This argument would deprive a litigant of standing and would deprive federal courts of inquiry as to all kinds of governmental abuses of the First

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untimely in light of a failure to timely pursue the discovery through motion practice.

Amendment whenever there was a separate and unrelated system of subsidies. If it was not clear to Plaintiffs when they wrote those words, they should understand now that this Court will not countenance any argument that the government has "bought" a system of unconstitutional treatment through the creation of a separate and unrelated system of subsidies.

As for the four individual members of CFF, Cross-Defendants have raised some questions as to the size of their hog production, the amount of their assessments paid, and the likelihood that they will pay future assessments. For instance, Lawrence Ginter, Jr. retired from hog sales in 2000, though he has "left the door open" as to whether he will sell hogs in the future. (Stokes Exhibit 51 at 44-48.) With respect to Ginter, his claims are not moot since they are "capable of repetition, but evading review." *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1213 (6th Cir.1995).[11] As for the questions raised by Cross-Defendants regarding the other named members (with the exception of Richard Smith, who they concede has standing), a thorough analysis of the record reveals that these are inconsequential concerns in that the record of evidence certainly supports that James Joens and Rhonda Perry

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[11] Even if the claims of Ginter were moot, the Court would still properly rely upon his objections to the particular Pork Program spending because his views are representational of at least some of CFF's membership, given the uncontested evidence of CFF's membership surveys. Furthermore, much of the argument about standing in this case is unnecessary. As stated by Cross-Plaintiffs, the *United Foods* case struck down the Mushroom Act based on the standing of a single producer. (Reply Memorandum, Dkt. No. 228, at 3.) In this case, Cross-Defendants admit standing as to Richard Smith and Smith's standing, by itself, is sufficient to drive the litigation of the constitutional issues mentioned here.

have had some financial interests in hogs sold subject to assessment and continue to have some financial interests in hogs which will be sold subject to the assessment. (See Cross-Plaintiffs' Opposition to Plaintiffs' Motion for Summary Judgment on First Amendment Claims, at 27-28 and documents cited therein.) It is not required for standing that they have large swine herds nor that their hog ownership encompass any particular form of ownership (e.g., individual ownership as opposed to joint ownership). Therefore, the Court determines as a matter of law that Cross-Plaintiffs have both capacity and standing to assert their claims.

Unclean Hands

Cross-Defendants have urged that Cross-Plaintiffs should be prohibited from pressing its claims for equitable relief (declaratory judgment and injunction) due to the doctrine of unclean hands. Cross-Plaintiffs, though, have moved to dismiss this defense as a matter of law. This doctrine provides, generally, that a party seeking equity cannot obtain relief when the party is guilty of unconscionable conduct directly related to the matter of litigation. *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6th Cir. 1995); *In re Ben Jean Prevot*, 59 F.3d 556, 561 (6th Cir. 1995). In this case, the inequitable conduct is only charged against one CFF member, Rhonda Perry. It is claimed that she improperly operated Patchwork Farms as a for-profit business and advocacy organization even though it was registered as a non-profit organization in violation of 26 U.S.C. § 501(c)(3). It is argued by Cross-Defendants that this violation is related because Patchwork Farms purchased a large number of hogs from Rhonda Perry's husband.

Even assuming that there was some proof of a section 501(c)(3) violation, which the Court cannot find on this record, there is nothing in the record which directly connects the violation by the not-for-profit corporation to the subject matter of this suit. Furthermore, even if some of Rhonda Perry's hog sales, which were subject to assessment, were made to the not-for-profit corporation, it remains true that many other sales were made to other buyers. Moreover, even assuming a violation, the worst that can be said is that the not-for-profit corporation received tax subsidies to which it was not entitled. This is hardly proof that Rhonda Perry is guilty of the kind of grossly unconscionable misconduct which is usually the source of an unclean hands defense. *See Performance Unlimited, supra.* It is also hardly proof that the misconduct was directly related to the First Amendment challenges in this case. *See Shondel v. McDermott*, 775 F.2d 859, 869 (7th Cir. 1985) (holding that denial of preliminary injunction was inappropriate based on unrelated Hatch Act violation).

Cross-Defendants should also remember that the purpose of equity is to do equity. It would hardly be equitable to foreclose a constitutional argument regarding compelled association and speech because of a past receipt of a tax subsidy by a separate not-for-profit corporation. It also goes without saying that the attempt by Cross-Defendants to apply this argument to not only Perry but to all Cross-Plaintiffs would be a true perversion of equity and an affront to public policy. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968) (rejecting unclean hands defense in context of Sherman and Clayton Act cases). As Judge Posner

stated in Shondel, 775 F.2d at 869, "[e]quitable defenses such as unclean hands may also have more limited play in free speech cases than elsewhere. There is an analogy to antitrust law, where the Supreme Court has forbidden the recognition of a similar defense—in pari delicto (equally at fault)-in order to encourage antitrust enforcement." *See also Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852, 861 (5th Cir. 1979). The interests at stake here are simply too weighty to be driven upon the shoals of failed litigation because of the alleged tax cheating of a single litigant.[12] As such, the Court determines as a matter of law that Cross-Plaintiffs are entitled to summary judgment on the defense of unclean hands.

Governmental Speech

Cross-Defendants argue that a First Amendment violation cannot be established on the present record because the speech resulting from the payment of assessments is "governmental speech." This defense is commonly applied in cases before this Court involving individuals who object to particular governmental messages, such as libertarians who oppose government funded anti-drug ads or pacifists who oppose army recruitment. As the Supreme Court has said,

> If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private

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[12] By Cross-Plaintiffs' calculations, these issues will affect more than 80,000 hog farmers. (Cross-Plaintiffs' Motion to Dismiss, at 11.) They also evidently affect consumers, processors, retailers and countless workers.

> sector, and the process of government as we know it radically transformed.

Keller v. State of Bar of California, 496 U.S. 1, 12-13, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).

In addition to these general principles, Cross-Defendants have supported their argument by reference to cases which, generally speaking, stand for the propositions that the government may tax and assess for the purpose of governmental speech, that the government may employ private actors to perform its speech, and that the speech need not be agreeable to those taxed or assessed. (*See, e.g.*, Plaintiffs' Brief in Opposition, at 3-5 and authorities cited therein.) Adding to the force of these arguments is the fact that the Supreme Court failed to address a government speech defense in the *United Foods* case because it had not been briefed or argued by the parties before the Sixth Circuit. *United Foods*, 533 U.S. at 415, 121 S. Ct. 2334. Although the Supreme Court did not address the issue in *United Foods*, it did refer to its prior decision in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995). In *Lebron*, the Supreme Court determined that Amtrack was a government entity for the purpose of determining whether it could limit speech in its leased facilities. To quote the Court:

> "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."

Lebron, 513 U.S. at 400, 115 S. Ct. 961.

Review of the organizational structure behind the Pork Act advertising evidences a complex structure with extensive government oversight. The National Pork Board is a 15 member Board appointed by the Secretary of Agriculture. 7 U.S.C. § 4808(a). The Act intended that the Pork Board employ private contractors for the purpose of carrying out Pork Act activities. However, the Act provided that, during an interim period, assessment funds would be supplied to the National Pork Producers Council (an Iowan not-for-profit corporation) to carry out the Act. *See* 7 U.S.C. § 4809. Since its creation, the National Pork Producers Council was the primary contractor for the Pork Board until July 1, 2001. (Stokes Declaration, Exhibit 2.) The Council's removal from that position resulted from the previous parties' February 28, 2001 settlement, which continued the Pork Program with modifications. Prior to the settlement, the previous parties were aware of a survey by the Office of Inspector General for the Department of Agriculture which criticized the extent to which the Pork Board had delegated authority to the Producers Council. (Plaintiffs' Motion, Dkt. No. 182, Appendix 14; Carpenter Deposition, Exhibit 51.) While the Producers Council is no longer the primary contractor, many of the same personnel who worked for the Producers Council still perform the Pork Act functions previously performed by the Producers Council. (Stokes Exhibit 5 at 6; Stokes Exhibit 16 at 131-41, 146-51.) Prior to 2002, the majority of Pork Act advertising was identified as from "America's Pork Producers," in reference to the Producers Council. (Hemmelman Reply Declaration at ¶ 3.)

Under the Pork Act, the Pork Board's planning and operations are to be overseen and approved by the Secretary of Agriculture. 7 U.S.C. § 4808(b)(1). The Secretary also has administrative authority to fire Board members when continued service would be "detrimental" to the purposes of the Pork Act. 7 C.F.R. § 1230.55. Furthermore, the Internal Revenue Service has determined to treat the Pork Board as a governmental entity for tax purposes. (See Plaintiffs' Motion, Dkt. No. 182, Appendix 27.) It is also noteworthy that Pork Board members are selected on a representational basis from nominees made by the National Pork Producers Delegate Body. 7 U.S.C. §§ 4806(g) and 4808(a). The Delegate Body is a larger congress of pork producers which serves to recommend assessment rates and determine the percentage of overall assessments which are designated for use by state associations. 7 U.S.C. § 4806(h). The Delegate Body is nominated and elected within each state's producer association. 7 U.S.C. § 4807. There are currently 44 state pork associations, six of whom are parties to this suit. (Stokes Declaration ¶ 6; Stokes Exhibits 4 & 16.) The Department of Agriculture has no authority to appoint or approve the leadership of the state associations. 7 U.S.C. § 4802(16); 7 C.F.R. § 1230.25.

As stated earlier, the current assessment is 45 cents per $100 in market value for each hog sold. 7 C.F.R. § 1230.112. These assessments fund the Pork Board, whose budget was $57.5 million in 2001 (with a $4.5 million deficit). (Stokes Exhibit 1, NPPC 374.) Of this budget, $29.4 million was used for "demand enhancement." (*Id.*) Demand enhancement includes advertising, marketing and merchandising. (*Id.*, NPPC 274-378.) For 2001, state pork associations were allotted

$10.4 million, or 18 percent of assessment funds. (*Id.*, NPPC 374.)

Consistent with the Pork Act, the Department of Agriculture regularly reviews the advertising and other project budgets of the Pork Board. (Carpenter Deposition at 33, 60-61; Dorminy Deposition at 101.) The Department also reviews the budgets of state associations. (Carpenter Deposition at 139-140; Dorminy Deposition at 60-61.) As part of this review, the Department may request modification of budgets or repayment of disallowed items. (Carpenter Deposition at 106-112.)

Similarly, the Department reviews each Pork Act advertisement before airing. (Carpenter Deposition at 173, 182.) This review is a general review to ensure that the advertisement is factual, is not disparaging of other commodities, and is consistent with the purposes of the Pork Act. (*Id.*) A similar review is done by the Department as to the advertisements of the state pork associations. (*Id.* at 148.) This kind of review results in amendments of only approximately four percent of the ads shown to the Department. (Hemmelman Reply Declaration at ¶ 3.)

While the Supreme Court did not address the governmental speech question in *United Foods*, this question has been addressed by federal courts in contexts very similar to the present one. In particular, the Third Circuit addressed this issue in the case of *United States v. Frame*, 885 F.2d 1119, 1132 (3rd Cir. 1989). The Frame decision addressed the Beef Promotion and Research Act, 7 C.F.R. §§ 2901-11, which contained essentially identical mechanisms to those in the Pork Act for the funding and promotion of generic advertising to sell beef. The Third Circuit analyzed the

issues in detail and specifically with reference to the Supreme Court's decisions in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L. Ed. 2d 261 (1977) and *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). *Abood* upheld a First Amendment challenge to the use of union dues, by a public school system, to finance political speech. *Wooley* upheld a First Amendment challenge to a legal requirement that a state's citizen display an offensive state moto, "Live Free or Die." The *Frame* Court's analyzed the government speech issue as follows:

> The district court and the government have set forth sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute "government speech." The Cattlemen's Board and the Operating Committee, the argument goes, are merely instrumentalities created to enable the Secretary of Agriculture to communicate his message that beef is good. As we have previously noted, the connection between these entities and the Secretary is a close one. The Board and Committee members serve at the pleasure of the Secretary of Agriculture: Cattlemen's Board members are appointed by the Secretary, 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141(b), while members of both the Board and the Operating Committee may be removed "if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act," 7 C.F.R. § 1260.212. Moreover, the Secretary makes the final decisions on all projects funded under the Act. All budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary, 7 U.S.C. § 2904(4)(C), and no contracts for the implementa-

tion of any plans may be entered into without the Secretary's approval, 7 U.S.C. §§ 2904(6)(A) & (B); 7 C.F.R. §§ 1260.150(f) & (g), 1260.168(e) & (f). Thus, when the Board or Committee "speaks," they do so on behalf of the Secretary of Agriculture and the government of the United States.

Nevertheless, though we find the issue a close one, the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as "government speech." Justice Powell's *Abood* concurrence sought to ensure that "a local school board need not demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent." 431 U.S. at 259 n. 13, 97 S. Ct. 1782. . . . This attempt to cabin the *Abood* decision echoed prior sentiments that recognition of a broad right against compelled association and belief might obstruct normal governmental functions. In *Wooley v. Maynard*, for example, the Court determined that coerced bearing of the state slogan on one's car violated freedom of belief, but apparently acquiesced to the dissent's observation that the state was free to tax all citizens for erection and maintenance of billboards bearing the state motto "Live Free or Die," see *id.*, 430 U.S. at 721, 97 S. Ct. 1428 . . . (Rehnquist, J., dissenting). . . .

These situations, we believe, are distinguishable from the case now before us. Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief

presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. *See Wooley v. Maynard*, 430 U.S. at 721, 97 S. Ct. 1428 . . . (Rehnquist, J., dissenting). In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes. . . . This sort of funding scheme, with its close nexus between the individual and the message funded, more closely resembles the *Abood* situation, where the unions, as exclusive bargaining agents, served as the locutors [*sic*] for a distinguishable segment of the population, *i.e.*, the employees, or the *Wooley* case, where the state "require[d] an individual to participate in the dissemination of an ideological message . . .," *Wooley*, 430 U.S. at 712-13, 97 S. Ct. at 1434, . . . regardless of whether state-issued license plates constituted "government speech."

Furthermore, Justice Powell's justification for distinguishing compelled support of government from support of a private association does not fit comfortably with a "self-help" measure like the Beef Promotion Act. According to Justice Powell, the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment

> of the population, with certain common interests. 431 U.S. at 259 n.13, 97 S. Ct. at 1811-12 n.13. The Cattlemen's Board seems to be an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or overriding purpose is to promote the economic welfare of cattle producers." 7 U.S.C. § 2905(b)(3) & (4). Therefore, we believe that although the Secretary's extensive supervision passes muster under the nondelegation doctrine, it does not transform this self-help program for the beef industry into "government speech."

Frame, 885 F.2d at 1132-33.

Another federal court which has recently followed the reasoning in Frame is the District of South Dakota in its decision of *Livestock Marketing Assoc. v. United States Dept. of Agriculture*, 207 F. Supp. 2d 992 (D.S.D. 2002.) Whereas the *Frame* court ultimately upheld the Beef Act speech as compelled, but non-ideological speech, the *Livestock Marketing* case enjoined assessments under the Beef Act due to the logic of the intervening *United Foods* decision. The Livestock Marketing case also commented,

> Common sense tells us that the government is not "speaking" in encouraging consumers to eat beef. After all, is the "government message" therefore that consumers should eat no other product or at least reduce the consumption of other products such as pork, chicken, fish, or soy meal? The answer is obvious.

Id. at 1006. While the Eighth Circuit Court of Appeals has granted a stay of the *Livestock Marketing* decision, the stay itself does not provide much guidance. The Eighth Circuit's Order granting the stay was silent as to the merits of the controversy and should only be interpreted as staying the decision to maintain the status quo pending decision and protect the Eighth Circuit's jurisdiction. *See Livestock Marketing*, Appeal No. 02-2769, Order of July 10, 2002 (8th Cir. July 10, 2002) (included as Moeller Exhibit No. 59).

This Court concurs with the *Frame* and *Livestock Marketing* decisions. What is present here is a self-help program for pork producers. Though the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into "government speech" as that term has been interpreted by the federal courts. You cannot make a silk purse from a sow's ear. This defense fails as a matter of law.

First Amendment Speech and Association

Before deciding the question of whether either of the parties is entitled to summary judgment on the First Amendment Speech and Association Claims, the Court must set forth the backdrop of precedent created by the Supreme Court's *United Foods* and *Glickman* decisions. These precedents are such that once their

applicability is decided, conclusions of constitutionality or unconstitutionality are but a stone's throw away.

In *United Foods*, the Supreme Court tackled the constitutionality of the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.*, which was similar in its mechanisms and purpose—*i.e.*, the promotion of mushroom sales by generic mushroom advertising through an industry self-help program. In *United Foods*, the Supreme Court indicated that it was not addressing the question of whether the "commercial speech" analysis under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) applied "for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *United Foods*, 533 U.S. at 410, 121 S. Ct. 2334.

Before reaching a conclusion, the Supreme Court reviewed its *Glickman* precedent, which was made in 1997. In *Glickman*, the Supreme Court upheld a generic marketing program that was created during the depression era, which involved California fruit trees and which was in the context of a "collectivized" marketing order. According to the *United Foods* decision:

> In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case we emphasized "the importance of the statutory context in which it arises." 521 U.S. at 469, 117 S. Ct. 2130. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business

> activity." *Id.*, at 469, 521 U.S. 457, 117 S. Ct. 2130. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.*, at 461, 521 U.S. 457, 117 S. Ct. 2130. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.*, at 469, 521 U.S. 457, 117 S. Ct. 2130. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

United Foods, 533 U.S. at 412, 121 S. Ct. 2334.

In contrast, the *United Foods* case involved a mushroom industry which was not collectivized, which was not exempt from anti-trust laws, and was not the subject of an expansive marketing order. *Id.* at 412, 121 S. Ct. 2334. Thus, the Supreme Court rejected the application of *Glickman* and instead held that:

> the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must

> remain members of the group by law or necessity. *See, e.g., Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).

Id. at 412, 121 S. Ct. 2334.

In the case of pork marketing, this case resembles *United Foods* much more so than *Glickman*. As in the case of mushroom production considered in *United Foods*, pork is not subject to a comprehensive and collectivized marketing order. There is no necessity for a mandated marketing approach as part of a specialized industry. As such, the Court will apply the rule in *United Foods*.

As noted above, the *United Foods* decision relied in part on the Supreme Court's *Keller* decision. *Keller* is the precedent which forbids a state bar (as to which membership is required to practice law) from charging mandatory dues to members and then using those dues to pay for political or ideological advocacy as to which some members object. Similar to the *Keller* decision, the instant case involves mandated fees which are directed toward a discrete occupation (hog producers)[13] and which fund speech as to which some producers have sincere philosophical, political and commercial disagreements. Even aside from the important political and philosophical objections to such speech, the commercial

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[13] As part of the briefing Cross-Defendants have argued that the assessments are not directed at hog producers, but only the sale of hogs. This is a distinction without a difference. Hog producers, not others, sell hogs for slaughter. The assessments are directed toward them, just as surely as if the statutory language had branded their foreheads.

interests of objecting producers to such speech is ample. In days of low return on agriculture, the decision of an individual farmer to devote funds to uses other than generic advertising are very important. Indeed, the frustration of some farmers are likely to only mount when those funds are used to pay for competitors' advertising, thereby depriving the farmer of the ability to pay for either niche advertising or non-advertising essentials (such as feed for livestock). This is true regardless of whether objecting farmers are correct in their economic analysis that the assessments and speech do not sufficiently further their own particular interests. In short, whether this speech is considered on either philosophical, political or commercial grounds, it involves a kind of outrage which Jefferson loathed. The government has been made tyrannical by forcing men and women to pay for messages they detest. Such a system is at the bottom unconstitutional and rotten.

For these reasons, the Court concludes that the mandated system of Pork Act assessments is unconstitutional since it violates the Cross-Plaintiffs' rights of free speech and association. *See also Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (discussing association rights); *Frame*, 885 F.2d at 1133-34; LMA, 207 F. Supp. 2d at 1003-7; *Cal-Almond, Inc. v. Dept. of Agriculture*, 14 F.3d 429, 434-35 (9th Cir. 1993) (discussing issue in context of almond marketing order).

Remedy

Since the Court has granted Cross-Plaintiffs summary judgment as to liability, the question arises as to the scope of the necessary remedy. Cross-Plaintiffs have requested entry of a declaration, declaring the

Pork Program unconstitutional, and the entry of an injunction, prohibiting the operation of the Pork Program and the collection of any assessments under the Pork Program. Plaintiffs and Governmental Defendants, however, argue that this scope of an injunction is much too broad. They urge that the Court should limit an injunction to a prohibition of making mandatory assessments against only the named Cross-Plaintiffs in this suit. This suggestion was contrary to the remedies ordered in *LMA* and *United Foods*.

It appears to the Court, as argued by Cross-Plaintiffs, that such a remedy would be at the least unwise. The Pork Act was written without severability provisions. This indicated an intent by Congress that the Act's provisions rise or fall when considering constitutionality. By making the Act a "voluntary" assessment as opposed to a "mandatory assessment," there is no assurance that the funds generated will be sufficient to support the infrastructure which Congress created to carry out the Act. This is a real concern in this case because the statute was enacted to require "mandatory" assessments precisely because the previous system of voluntary contributions would not support a sizable program. The provisions of the Pork Act are also intertwined. *See Hill v. Wallace*, 259 U.S. 44, 70-72, 42 S. Ct. 453, 66 L. Ed. 822 (1922) (holding that Futures Trading Act was wholly unconstitutional in light of its intertwined provisions and lack of a severability clause).

In this context, a limited injunction would essentially re-write the Act in a manner inconsistent with judicial interpretation. See *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) (citing *Blount v. Rizz*, 400 U.S. 410, 419, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971));

LMA, supra. Additionally, as a practical matter, such would be impossible in this case. No suggested mechanism has been provided for making future assessments voluntary for claimants. Indeed, the identity of all of CFF's members are not even known. Finally, such an approach appears simply wrong-headed in the context of a program with a significant lack of producer support, such as the current Pork Program. Therefore, the Court will approve the declaratory and injunctive relief requested by Cross-Plaintiffs. The Court finds that such equitable relief is not only supported by the substantive law, but also by the equitable factors which support injunctive relief.

While doing so, the Court will not make the ordered injunction effective until 30 days from the date of the Injunction. The purpose of this delay is to allow Governmental Defendants and Plaintiffs to exercise their rights to seek a stay under Federal Rule of Appellate Procedure 8. The Court also denies any request for stay by this Court, for the reasons stated in this Opinion, so that any further request for such may be made directly to the Court of Appeals.

CONCLUSION

For the reasons stated, Cross-Plaintiffs' Motion for Summary Judgment and Motion to Dismiss Affirmative Defenses shall be granted, and the motions of the other parties denied. Further, for relief of Cross-Plaintiffs, the Court will grant declaratory relief declaring the Pork Act unconstitutional and enjoining the collection of Pork Act assessments and the operation of the Pork Check-off Program. This relief will be ordered as part of Final Judgment and Injunction since this disposition completes the adjudication of claims in this matter.

ORDER

Upon further inspection of its Opinion of October 25, 2002, this Court determines that said Opinion should be corrected, pursuant to Federal Rule of Civil Procedure 60(a), to remedy clerical error.

THEREFORE, IT IS HEREBY ORDERED that the word "agricultural" on page 28, line 9 of the second full paragraph, is corrected to read "agriculture".

FINAL JUDGMENT AND INJUNCTION

In accordance with the Opinion of this date;

IT IS HEREBY ORDERED that Cross-Plaintiffs Campaign for Family Farms, James Dale Joens, Richard Smith, Rhonda Perry and Lawrence Ginter's Motion for Summary Judgment (Dkt. No. 162) and Motion to Dismiss (Dkt. No. 170) are **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs Michigan Pork Producers, National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, and Ohio Pork Producers' Motion for Summary Judgment (Dkt. No. 182) and Motion to Strike (Dkt. No. 220) are **DENIED.**

IT IS FURTHER ORDERED that Governmental Defendants Secretary Ann Veneman and Administrator A.J. Yates' Motion for Summary Judgment (Dkt. No. 183) and Motion to Strike (Dkt. No. 199) are **DENIED.**

IT IS FURTHER ORDERED that the Court declares the Pork Production, Research and Consumer Education Act of 1985, 7 U.S.C. § 4801 *et seq.* to be unconstitutional.

IT IS FURTHER ORDERED that the Court enjoins Cross-Defendants Michigan Pork Producers, National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, Ohio Pork Producers, Secretary Ann Veneman and Administrator A.J. Yates and those acting for them as officers, agents, employees and contractors, to cease the collection of assessments under the Pork Act and to cease the operation of the Pork Check-off Program effective 30 days from the issuance of this Final Judgment and Injunction.

IT IS FURTHER ORDERED that any request for stay of this Final Judgment and Injunction is **DENIED** and Cross-Defendants are directed to seek such stay, should they so desire, from the Court of Appeals.

IT IS FURTHER ORDERED that attorney fees may be sought as directed under Federal Rule of Civil Procedure 54(d).

IT IS FURTHER ORDERED that costs may be billed as directed under Local Civil Rule 54.1.

APPENDIX C

The Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. 4801 *et seq.*, provides:

§ 4801. Congressional findings and declaration of purpose

(a) Congress finds that—

(1) pork and pork products are basic foods that are a valuable and healthy part of the human diet;

(2) the production of pork and pork products plays a significant role in the economy of the United States because pork and pork products are—

(A) produced by thousands of producers, including many small- and medium-sized producers; and

(B) consumed by millions of people throughout the United States on a daily basis;

(3) pork and pork products must be available readily and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets, and development of new markets, for pork and pork products are vital to—

(A) the welfare of pork producers and persons concerned with producing and marketing pork and pork products; and

(B) the general economy of the United States;

(5) pork and pork products move in interstate and foreign commerce;

(6) pork and pork products that do not move in such channels of commerce directly burden or affect interstate commerce in pork and pork products; and

(7) in recent years, increasing quantities of low-cost, imported pork and pork products have been brought into the United States and replaced domestic pork and pork products in normal channels of trade.

(b)(1) It is the purpose of this chapter to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to—

(A) strengthen the position of the pork industry in the marketplace; and

(B) maintain, develop, and expand markets for pork and pork products.

(2) Such procedure shall be implemented, and such program shall be conducted, at no cost to the Federal Government.

(3) Nothing in this chapter may be construed to—

(A) permit or require the imposition of quality standards for pork or pork products;

(B) provide for control of the production of pork or pork products; or

(C) otherwise limit the right of an individual pork producer to produce pork and pork products.

§ 4802. Definitions

For purposes of this chapter:

(1) The term "Board" means the National Pork Board established under section 4808 of this title.

(2) The term "consumer information" means an activity intended to broaden the understanding of sound nutritional attributes of pork or pork products, including the role of pork or pork products in a balanced, healthy diet.

(3) The term "Delegate Body" means the National Pork Producers Delegate Body established under section 4806 of this title.

(4) The term "imported" means entered, or withdrawn from a warehouse for consumption, in the customs territory of the United States.

(5) The term "importer" means a person who imports porcine animals, pork, or pork products into the United States.

(6) The term "order" means a pork and pork products promotion, research, and consumer information order issued under section 4803 of this title.

(7) The term "person" means an individual, group of individuals, partnership, corporation, association, organization, cooperative, or other entity.

(8) The term "porçine animal" means a swine raised for—

(A) feeder pigs;

(B) seedstock; or

(C) slaughter.

(9) The term "pork" means the flesh of a porcine animal.

(10) The term "pork product" means a product produced or processed in whole or in part from pork.

(11) The term "producer" means a person who produces porcine animals in the United States for sale in commerce.

(12) The term "promotion" means an action, including paid advertising, taken to present a favorable image for porcine animals, pork, or pork products to the public with the intent of improving the competitive position and stimulating sales of porcine animals, pork, or pork products.

(13) The term "research" means—

(A) research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products; or

(B) dissemination to a person of the results of such research.

(14) The term "Secretary" means the Secretary of Agriculture.

(15) The term "State" means each of the 50 States.

(16) The term "State association" means—

(A) the single organization of pork producers in a State that is—

(i) organized under the laws of the State in which such association operates; and

(ii) recognized by the chief executive officer of such State as representing the pork producers of such State; or

(B) if such organization does not exist on January 1, 1986, an organization that represents not fewer than 50 pork producers who market annually, in the aggregate, not less than 10 percent of the volume (measured in pounds) of porcine animals marketed in such State.

(17) The term "to market" means to sell or to otherwise dispose of a porcine animal, pork, or pork product in commerce.

§ 4803. Pork and pork product orders

(a) To carry out this chapter, the Secretary shall, in accordance with this chapter, issue and, from time to time, amend orders applicable to persons engaged in—

(1) the production and sale of porcine animals, pork, and pork products in the United States; and

(2) the importation of porcine animals, pork, or pork products into the United States.

(b) The Secretary may issue such regulations as are necessary to carry out this chapter.

§ 4804. Notice and hearing

During the period beginning on January 1, 1986, and ending 30 days after receipt of a proposal for an initial order submitted by any person affected by this chapter, the Secretary shall—

(1) publish such proposed order; and

(2) give due notice of and opportunity for public comment on such proposed order.

§ 4805. Findings and issuance of orders

(a) Necessary findings

After notice and opportunity for public comment have been provided in accordance with section 4804 of this title, the Secretary shall issue and publish an order if the Secretary finds, and sets forth in such order, that the issuance of such order and all terms and conditions thereof will assist in carrying out this chapter.

(b) Number of orders in effect at a time

Not more than one order may be in effect at a time.

(c) Effective date

An order shall become effective on a date that is not more than 90 days following the publication of such order.

(d) Terms and conditions

An order shall contain such terms and conditions as are required in sections 4806 through 4809 of this title and, except as provided in section 4810 of this title, no others.

§ 4806. National Pork Producers Delegate Body

(a) Establishment and appointment

The order shall provide for the establishment and appointment by the Secretary, not later than 60 days after the effective date of such order, of a National Pork Producers Delegate Body.

(b) Membership; number of producer members; number of importer members

(1) The Delegate Body shall consist of—

(A) producers, as appointed by the Secretary in accordance with paragraph (2), from nominees submitted as follows:

(i) in the case of the initial Delegate Body appointed by each State in accordance with section 4807 of this title.

(ii) in the case of each succeeding Delegate Body, each State association shall submit nominations selected by such association pursuant to a selection process that—

(I) is approved by the Secretary;

(II) requires public notice of the process to be given at least one week in advance by publication in a newspaper or newspaper of general circulation in such State and in pork production and agriculture trade publications; and

(III) that provides complete and equal access to the nominating process to every producer who has paid all assessments due under section 4809 of this title and not demanded a refund under section 4813 of this title,

or pursuant to an election of nominees conducted in accordance with section 4807 of this title.

(iii) In the case of a State that has a State association that does not submit nominations or that does not have a State association, such State shall submit nominations in a manner prescribed by the Secretary; and

(B) importers, as appointed by the Secretary in accordance with paragraph (3).

(2) The number of producer members appointed to the Delegate Body from each State shall equal at least two members, and additional members, allocated as follows:

(A) Shares shall be assigned to each State—

(i) for the 1986 calendar year, on the basis of one share for each $400,000 of farm market value of porcine animals marketed from such State (as determined by the Secretary based on the annual average of farm market value in the most recent 3 calendar years preceding such year), rounded to the nearest $400,000; and

(ii) for each calendar year thereafter, on the basis of one share for each $1,000 of the aggregate amount of assessments collected (minus refunds under section 4813 of this title) in such State from persons described in section 4809(a)(1)(A) and (B) of this title, rounded to the nearest $1,000.

(B) If during a calendar year the number of such shares of a State is—

(i) less than 301, the State shall receive a total of two producer members;

(ii) more than 300 but less than 601, the State shall receive a total of three producer members;

(iii) more than 600 but less than 1,001, the State shall receive a total of four producer members; and

(iv) more than 1,000, the State shall receive four producer members, plus one additional mem-

ber for each 300 additional shares in excess of 1,000 shares, rounded to the nearest 300.

(3) The number of importer members appointed to the Delegate Body shall be determined as follows:

(A) Shares shall be assigned to importers—

(i) for the 1986 calendar year, on the basis of one share for each $575,000 of market value of marketed porcine animals, pork, or pork products (as determined by the Secretary based on the annual average of imports in the most recent 3 calendar years preceding such year), rounded to the nearest $575,000; and

(ii) for each calendar year thereafter, on the basis of one share for each $1,000 of the aggregate amount of assessments collected (minus refunds under section 4813 of this title) from importers, rounded to the nearest $1,000.

(B) The number of importer members appointed to the Delegate Body shall equal a total of—

(i) three members for the first 1,000 such shares; and

(ii) one additional member for each 300 additional shares in excess of 1,000 shares, rounded to the nearest 300.

(c) Voting; quorum; votes necessary for decision

(1) A producer member of the Delegate Body may, in a vote conducted by the Delegate Body for which the member is present, cast a number of votes equal to—

(A) the number of shares attributable to the State of the member; divided by

(B) the number of producer members from such State.

(2) An importer member of the Delegate Body may, in a vote conducted by the Delegate Body for which the member is present, cast a number of votes equal to—

(A) the number of shares allocated to importers; divided by

(B) the number of importer members.

(3) Members entitled to cast a majority of the votes (including fractions thereof) on the Delegate Body shall constitute a quorum.

(4) A majority of the votes (including fractions thereof) cast at a meeting at which a quorum is present shall be decisive of a motion or election presented to the Delegate Body for a vote.

(d) Term of office

A member of the Delegate Body shall serve for a term of 1 year, except that the term of a member of the Delegate Body shall continue until the successor of such member, if any, is appointed in accordance with subsection (b)(1) of this section.

(e) Chairman

(1) At the first annual meeting, the Delegate Body shall select a Chairman by a majority vote.

(2) At each annual meeting thereafter, the President of the Board shall serve as the Chairman of the Delegate Body.

(f) Compensation

A member of the Delegate Body shall serve without compensation, but may be reimbursed by the Board

from assessments collected under section 4809 of this title for transportation expenses incurred in performing duties as a member of the Delegate Body.

(g) Nomination of members to National Pork Board; annual meeting; majority vote in person to nominate

(1) The Delegate Body shall—

(A) nominate—

(i) not less than 23 persons for appointment to the Board, for the first year for which nominations are made; and

(ii) not less than $1^1/_2$ persons (rounded up to the nearest person) for each vacancy in the Board that requires nominations thereafter; and

(B) submit such nominations to the Secretary.

(2) The Delegate Body shall meet annually to make such nominations.

(3) A majority of the Delegate Body shall vote in person in order to nominate members to the Board.

(h) Duties and functions

The Delegate Body shall—

(1) recommend the rate of assessment prescribed by the initial order and any increase in such rate pursuant to section 4809(5)[1] of this title, and

(2) determine the percentage of the aggregate amount of assessments collected in a State that each State association shall receive under section 4809(c)(1) of this title.

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[1] So in original. Probably should be section "4809(b)".

§ 4807. Selection of Delegate Body

(a) Nominations

(1) Not later than 30 days after the effective date of the order, the Secretary shall call for the nomination within each State of candidates for appointment as producer members of the initial Delegate Body.

(2) Each State association may nominate producers who are residents of such State to serve as such candidates.

(3)(A)[2] Additional producers who are residents of a State may be nominated as candidates of such State by written petition signed by 100 producers or 5 percent of the pork producers in such State, whichever is less. The Secretary shall establish and publicize the procedures governing the time and place for filing petitions.

(b) Election; eligibility to vote; notice of election; number of members nominated

(1) After the Secretary has received the nominations required under subsection (a) of this section and not later than 45 days after the effective date of the order, the Secretary shall call for an election within each State of persons for appointment as producer members of the initial Delegate Body.

(2) To be eligible to vote in an election held in a State, a person must be a producer who is a resident of such State.

(3)(A) Notice of each such election shall be given by the Secretary—

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[2] So in original. There is no subpar. (B).

(i) by publication in a newspaper or newspapers of general circulation in each State, and in pork production and agriculture trade publications, at least 1 week prior to the election; and

(ii) in any other reasonable manner determined by the Secretary.

(B) The notice shall set forth the period of time and places for voting and such other information as the Secretary considers necessary.

(4) Each State shall nominate to the Delegate Body the number of producer members required under section 4806(b)(2)(B) of this title.

(5) The producers who receive the highest number of votes in each State shall be nominated for appointment as members of the Delegate Body from such State.

(c) Subsequent nominations and elections to be administered by Board; time of election; voting eligibility

(1) Except as provided in paragraph (3), after the election of the producer members of the initial Delegate Body, the Board shall administer all subsequent nominations and elections of the producer members to be nominated for appointment as members of the Delegate Body, with the assistance of the Secretary and in accordance with subsections (a)(3) and (b) of this section.

(2) The Board shall determine the timing of an election referred to in paragraph (1).

(3) To be eligible to vote in such an election in a State, a person must—

(A) be a producer who is a resident of such State;

(B) have paid all assessments due under section 4809 of this title; and

(C) not demanded a refund of an assessment under section 4813 of this title.

(d) Nominating committee; appointment; nomination to fill position for pending election

(1) Prior to the expiration of the term of any producer member of the Delegate Body, the Board shall appoint a nominating committee of producers who are residents of the State represented by such member.

(2) Such committee shall nominate producers of such State as candidates to fill the position for which an election is to be held.

(3) Additional producers who are residents of a State may be nominated to fill such positions in accordance with subsection (a)(3) of this section.

§ 4808. National Pork Board

(a)(1) The order shall provide for the establishment and appointment by the Secretary of a 15-member National Pork Board.

(2)[1] The Board shall consist of producers representing at least 12 States and importers appointed by the Secretary from nominations submitted under section 4806(g) of this title.

(2)[1] The Board shall consist of producers or importers appointed by the Secretary from nominations submitted under section 4806(g) of this title.

(3) A member of the Board shall serve for a 3-year term, with no such member serving more than two

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[1] So in original. Two pars. designated "(2)" have been enacted.

consecutive 3-year terms, except that initial appointments to the Board shall be staggered with an equal number of members appointed, to the maximum extent possible, to 1-year, 2-year, and 3-year terms, except that the term of a member of the Board shall continue until the successor of such member, if any, is appointed in accordance with paragraph (2).

(4) The Board shall select its President by a majority vote.

(5)(A) A majority of the members of the Board shall constitute a quorum at a meeting of the Board.

(B) A majority of votes cast at a meeting at which a quorum is present shall determine a motion or election.

(6) A member of the Board shall serve without compensation, but shall be reimbursed by the Board from assessments collected under section 4809 of this title for reasonable expenses incurred in performing duties as a member of the Board.

(b)(1) The Board shall—

(A) develop, at the initiative of the Board or other person, proposals for promotion, research, and consumer information plans and projects;

(B) submit such plans and projects to the Secretary for approval;

(C) administer the order, in accordance with the order and this chapter;

(D) prescribe such rules as are necessary to carry out such order;

(E) receive, investigate, and report to the Secretary complaints of violations of such order;

(F) make recommendations to the Secretary with respect to amendments to such order; and

(G) employ a staff and conduct routine business.

(2) The Board shall prepare and submit to the Secretary, for the approval of the Secretary, a budget for each fiscal year of anticipated expenses and disbursements of the Board in the administration of the order, including the projected cost of—

(A) any promotion, research or consumer information plan or project to be conducted by the Board directly or by way of contract or agreement; and

(B) the budgets, plans, or projects for which State associations are to receive funds pursuant to section 4809(c)(1) of this title.

(3) No plan, project, or budget referred to in paragraph (1) or (2) may become effective unless approved by the Secretary.

(4)(A) The Board, with the approval of the Secretary, may enter into contracts or agreements with a person for—

(i) the development and conduct of activities authorized under an order; and

(ii) the payment of the cost thereof with funds collected through assessments under such order.

(B) Such contract or agreement shall require that—

(i) the contracting party develop and submit to the Board a plan or project, together with a budget or budgets that include the estimated cost to be incurred under such plan or project;

(ii) such plan or project become effective on the approval of the Secretary; and

(iii) the contracting party—

(I) keep accurate records of all relevant transactions of the party;

(II) make periodic reports to the Board of—

(aa) relevant activities the party has conducted; and

(bb) an accounting for funds received and expended under such contract; and

(III) make such other reports as the Secretary or Board may require.

§ 4809. Assessments

(a) Collection and remission to Board; persons required to pay

(1) The order shall provide that, not later than 30 days after the effective date of the order under section 4805(c) of this title an assessment shall be paid, in the manner prescribed in the order. Upon the appointment of the Board, the assessments held in escrow shall be distributed to the Board. Except as provided in paragraph (3), assessments shall be payable by—

(A) each producer for each porcine animal described in subparagraph (A) or (C) of section 4802(8) of this title produced in the United States that is sold or slaughtered for sale;

(B) each producer for each porcine animal described in subsection[1] 4802(8)(B) of this title that is sold; and

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[1] So in original. Probably should be "section".

(C) each importer for each porcine animal, pork, or pork product that is imported into the United States.

(2) Such assessment shall be collected and remitted to the Board once it is appointed pursuant to section 4808 of this title, but, until that time, to the Secretary, who shall promptly proceed to distribute the funds received by him in accordance with the provisions of subsection (c) of this section, except that the Secretary shall retain the funds to be received by the Board until such time as the Board is appointed pursuant to section 4808 of this title, by—

(A) in the case of subparagraph (A) of paragraph (1), the purchaser of the porcine animal referred to in such subparagraph;

(B) in the case of subparagraph (B) of paragraph (1), the producer of the porcine animal referred to in such subparagraph; and

(C) in the case of subparagraph (C) of paragraph (1), the importer referred to in such subparagraph.

(3) A person is not required to pay an assessment for a porcine animal, pork, or pork product under paragraph (1) if such person proves to the Board that an assessment was paid previously under such paragraph by a person for such porcine animal (of the same category described in subparagraph (A), (B), or (C) of section 4802(8) of this title), pork, or pork product.

(b) Rate of assessment; increase; waiver of collection of assessment

(1) Except as provided in paragraph (2), the rate of assessment prescribed by the initial order shall be the lesser of—

(A) 0.25 percent of the market value of the porcine animal, pork, or pork product sold or imported; or

(B) an amount established by the Secretary based on a recommendation of the Delegate Body.

(2) Except as provided in paragraph (3), the rate of assessment in the initial order may be increased by not more than 0.1 percent per year on recommendation of the Delegate Body.

(3) The rate of assessment may not exceed 0.50 percent of such market value unless—

(A) after the initial referendum required under section 4811(a) of this title, the Delegate Body recommends an increase in such rate above 0.50 percent; and

(B) such increase is approved in a referendum conducted under section 4811(b) of this title.

(4)(A) Pork or pork products imported into the United States shall be assessed based on the equivalent value of the live porcine animal from which such pork or pork products were produced, as determined by the Secretary.

(B) The Secretary may waive the collection of assessments on a type of such imported pork or pork products if the Secretary determines that such collection is not practicable.

(c) Distribution and use

Funds collected by the Board from assessments collected under this section shall be distributed and used in the following manner:

(1)(A) Each State association, shall receive an amount of funds equal to the product obtained by multiplying—

(i) the aggregate amount of assessments attributable to porcine animals produced in such State by persons described in subsection (a)(1)(A) and (B) of this section minus that State's share of refunds determined pursuant to paragraph (4) by such persons pursuant to section 4813 of this title; and

(ii) a percentage applicable to such State association determined by the Delegate Body, but in no event less than sixteen and one-half percent, or

(B) in the case of a State association that was conducting a pork promotion program in the period from July 1, 1984, to June 30, 1985, if greater than (A) an amount of funds equal to the amount of funds that would have been collected in such State pursuant to the pork promotion program in existence in such State from July 1, 1984, to June 30, 1985, had the porcine animals, subject to assessment and to which no refund was received in such State in each year following December 23, 1985, been produced from July 1, 1984, to June 30, 1985, and been subject to the rates of assessments then in effect and the rate of return then in effect from each State to the Council described in paragraph (2)(A), and other national entities involved in pork promotion, research and consumer information.

(C) A State association shall use such funds and any proceeds from the investment of such funds for financing—

(i) promotion, research, and consumer information plans and projects, and

(ii) administrative expenses incurred in connection with such plans and projects.

(2)(A) The National Pork Producers Council, a nonprofit corporation of the type described in section 501(c)(3) of title 26 and incorporated in the State of Iowa, shall receive an amount of funds equal to—

(i) 37½ percent of the aggregate amount of assessments collected under this section throughout the United States from the date assessment commences pursuant to subsection (a)(1) of this section until the first day of the month following the month in which the Board is appointed pursuant to section 4808 of this title.[2]

(ii) 35 percent thereafter until the referendum is conducted pursuant to section 4811 of this title,

(iii) 25 percent until twelve months after the referendum is conducted, and

(iv) no funds thereafter except in so far as it obtains such funds from the Board pursuant to sections[3] 4808 or 4809 of this title, each of which amounts determined under (i), (ii), and (iii) shall be less the Council's share of refunds determined pursuant to paragraph (4).

(B) The Council shall use such funds and proceeds from the investment of such funds for financing—

(i) promotion, research, and consumer information plans and projects, and

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[2] So in original. The period probably should be a comma.

[3] So in original. Probably should be "section".

(ii) administrative expenses of the Council.

(3)(A) The Board shall receive the amount of funds that remain after the distribution required under paragraphs (1) and (2).

(B) The Board shall use such funds and any proceeds from the investment of such funds pursuant to subsection (g) of this section for—

(i) financing promotion, research, and consumer information plans and projects in accordance with this chapter;[4]

(ii) such expenses for the administration, maintenance, and functioning of the Board as may be authorized by the Secretary;

(iii) accumulation of a reasonable reserve to permit an effective promotion, research, and consumer information program to continue in years when the amount of assessments may be reduced; and

(iv) administrative costs incurred by the Secretary to carry out this chapter,[4] including any expenses incurred for the conduct of a referendum under this chapter.[4]

(4)(A) Each State's share of refunds shall be determined by multiplying the aggregate amount of refunds received by producers in such State by the percentage applicable to such State pursuant to paragraph (1)(A)(ii).

(B) The National Pork Producers Council's share of refunds shall be determined by multiplying its

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[4] See References in Text note below.

applicable percent of the aggregate amount of assessments by the product of--

(i) subtracting from the aggregate amount of refunds received by all producers the aggregate amount of State share or refunds in every State determined pursuant to subparagraph (A), and

(ii) adding to that sum the aggregate amount of refunds received by importers.

(d) Prohibited promotions

No promotion funded with assessments collected under this chapter may make—

(1) a false or misleading claim on behalf of pork or a pork product; or

(2) a false or misleading statement with respect to an attribute or use of a competing product.

(e) Influencing legislation prohibited

No funds collected through assessments authorized by this section may, in any manner, be used for the purpose of influencing legislation, as defined in section 4911(d) and (e)(2) of title 26.

(f) Maintenance of books and records; audits

The Board shall—

(1) maintain such books and records, and prepare and submit to the Secretary such reports from time to time, as may be required by the Secretary for appropriate accounting of the receipt and disbursement of funds entrusted to the Board or a State association, as the case may be; and

(2) cause a complete audit report to be submitted to the Secretary at the end of each fiscal year.

(g) Investment by Board of funds collected

The Board, with the approval of the Secretary, may invest funds collected through assessments authorized under this section, pending disbursement for a plan or project, only in—

(1) an obligation of the United States, or of a State or political subdivision thereof;

(2) an interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System; or

(3) an obligation fully guaranteed as to principal and interest by the United States.

§ 4810. Permissive provisions

(a) Recordkeeping and reporting requirements; incidental and necessary terms and conditions

On the recommendation of the Board, and with the approval of the Secretary, an order may contain one or more of the following provisions:

(1) Each person purchasing a porcine animal from a producer for commercial use, and each importer, shall—

(A) maintain and make available for inspection such books and records as may be required by the order; and

(B) file reports at the time, in the manner, and having the content prescribed by the order,

including documentation of the State of origin of a purchased porcine animal or the place of origin of an imported porcine animal, pork, or pork product.

(2) A term or condition—

(A) incidental to, and not inconsistent with, the terms and conditions specified in this chapter; and

(B) necessary to effectuate the other provisions of such order.

(b) Availability of information to Secretary and Board; confidentiality; disclosure; issuance of general statement, statistical data, or name of violator of order

(1) Information referred to in subsection (a)(1) of this section shall be made available to the Secretary and the Board as is appropriate or necessary for the effectuation, administration, or enforcement of this chapter or an order.

(2)(A) Except as provided in subparagraphs (B) and (C), information obtained under subsection (a)(1) of this section shall be kept confidential by officers or employees of the Department of Agriculture or the Board.

(B) Such information may be disclosed only—

(i) in a suit or administrative hearing involving the order with respect to which the information was furnished or acquired—

(I) brought at the direction or on the request of the Secretary; or

(II) to which the Secretary or an officer of the United States is a party; and

(ii) if the Secretary considers such information to be relevant to such suit or hearing.

(C) Nothing in this section prohibits—

(i) the issuance of a general statement based on the reports of a number of persons subject to an order, or statistical data collected therefrom, if such

statement or data does not identify the information furnished by any person; or

(ii) the publication, by direction of the Secretary, of the name of a person violating an order, together with a statement of the particular provisions of the order violated by such person.

(c) Penalty for willful violations

A person who willfully violates subsection (a)(1) or (b) of this section shall, on conviction, be—

(1) subject to a fine of not more than $1,000 or imprisoned for not more than 1 year, or both; and

(2) if such person is an employee of the Department of Agriculture or the Board, removed from office.

§ 4811. Referendum

(a) Continuation of order

For the purpose of determining whether an order then[1] effect shall be continued during the period beginning not earlier than 24 months after the issuance of the order and ending not later than 30 months after the issuance of the order, the Secretary shall conduct a referendum among persons who have been pork producers and importers during a representative period, as determined by the Secretary.

(b) Factors determining continuation; termination of order

(1) Such order shall be continued only if the Secretary determines that such order has been approved by not less than a majority of the producers and importers voting in the referendum.

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[1] So in original. Probably should be "therefor".

(2) If the continuation of such order is not approved by a majority of the producers and importers voting in the referendum, the Secretary shall terminate—

(A) collection of assessments under the order not later than 6 months after the date of such determination; and

(B) the order in an orderly manner as soon as practicable after the date of such determination.

(c) Reimbursement for cost

The Secretary shall be reimbursed from assessments collected by the Board for any expenses incurred in connection with a referendum conducted under this section or section 4812 of this title.

(d) Manner of conducting

A referendum shall be conducted in such manner as prescribed by the Secretary.

(e) Amendment of initial order

A referendum to amend the initial order shall be conducted pursuant to this section.

§ 4812. Suspension and termination of orders

(a) Authority of Secretary

If after the initial referendum provided for in section 4811(a) of this title the Secretary determines that an order, or a provision of the order, obstructs or does not tend to effectuate the declared policy of this chapter, the Secretary shall terminate or suspend the operation of such order or provision.

(b) Referendum to terminate or suspend; eligible voters; requirements for approval; termination or suspension date; one referendum within 2-year period

(1)(A) Except as provided in paragraph (2), after the initial referendum provided for in section 4811(a) of this title, on the request of a number of persons equal to at least 15 percent of persons who have been producers and importers during a representative period, as determined by the Secretary, the Secretary shall conduct a referendum to determine whether the producers and importers favor the termination or suspension of the order.

(B) The Secretary shall—

(i) suspend or terminate collection of assessments under the order not later than 6 months after the date the Secretary determines that suspension or termination of the order is favored by a majority of the producers and importers voting in the referendum; and

(ii) terminate the order in an orderly manner as soon as practicable after the date of such determination.

(2) Except with respect to a referendum required to be conducted under section 4811 of this title, the Secretary shall not be required by paragraph (1) to conduct more than one referendum under this chapter in a 2-year period.

(c) Termination or suspension not to be considered an order

The termination or suspension of an order, or a provision of an order, shall not be considered an order within the meaning of this chapter.

§ 4813. Refunds

(a) Demand for refund; persons eligible

Notwithstanding any other provision of this chapter, prior to the approval of the continuation of an order pursuant to the referendum required under section 4811(a) of this title, any person shall have the right to demand and receive from the Board a refund of an assessment collected under section 4809 of this title if such person—

(1) is responsible for paying such assessment; and

(2) does not support the program established under this chapter.

(b) Form and time within which demand to be made

Such demand shall be made in accordance with regulations, on a form, and within a time period prescribed by the Board and approved by the Secretary, but not later than 30 days after the end of the month in which the assessment was paid.

(c) Payment of refund on submission of satisfactory proof

Such refund shall be made not later than 30 days after demand is received therefore[1] on submission of proof satisfactory to the Board that the producer, person, or importer—

(1) paid the assessment for which refund is sought; and

(2) did not collect such assessment from another producer, person, or importer.

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[1] So in original. Probably should be "therefor".

§ 4814. Petition and review

(a)(1) A person subject to an order may file with the Secretary a petition—

(A) stating that such order, a provision of such order, or an obligation imposed in connection with such order is not in accordance with law; and

(B) requesting a modification of such order or an exemption from such order.

(2) Such person shall be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary.

(3) After such hearing, the Secretary shall make a determination granting or denying such petition.

(b)(1) A district court of the United States in the district in which such person resides or does business shall have jurisdiction to review such determination if a complaint for such purpose is filed not later than 20 days after the date such person receives notice of such determination.

(2) Service of process in such proceeding may be made on the Secretary by delivering a copy of the complaint to the Secretary.

(3) If a court determines that such determination is not in accordance with law, the court shall remand such proceedings to the Secretary with directions to—

(A) make such ruling as the court shall determine to be in accordance with law; or

(B) take such further proceedings as, in the opinion of the court, the law requires.

§ 4815. Enforcement

(a) Jurisdiction of district court; referral of civil actions to Attorney General

(1) A district court of the United States shall have jurisdiction specifically to enforce, and to prevent and restrain a person from violating an order, rule, or regulation issued under this chapter.

(2) A civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action, except that the Secretary is not required to refer to the Attorney General a violation of this chapter if the Secretary believes that the administration and enforcement of this chapter would be adequately served by providing a suitable written notice or warning to a person who committed such violation or by administrative action under subsection (b) of this section.

(b) Penalties for willful violations; issuance of cease-and-desist orders; judicial review of orders; penalty for failure to obey cease-and-desist order

(1)(A) A person who willfully violates an order, rule, or regulation issued by the Secretary under this chapter may be assessed—

(i) a civil penalty by the Secretary of not more than $1,000 for each such violation; and

(ii) in the case of a willful failure to pay, collect, or remit an assessment as required by an order, an additional penalty equal to the amount of such assessment.

(B) Each such violation shall be a separate offense.

(C) In addition to or in lieu of such civil penalty, the Secretary may issue an order requiring such person to cease and desist from violating such order, rule, or regulation.

(D) No penalty may be assessed or cease-and-desist order issued unless the Secretary gives such person notice and opportunity for a hearing on the record with respect to such violation.

(E) An order issued under this paragraph by the Secretary shall be final and conclusive unless such person files an appeal from such order with the appropriate United States court of appeals not later than 30 days after such person receives notice of such order.

(2)(A) A person against whom an order is issued under paragraph (1) may obtain review of such order in the court of appeals of the United States for the circuit in which such person resides or does business, or in the United States Court of Appeals for the District of Columbia Circuit, by—

(i) filing a notice of appeal in such court not later than 30 days after the date of such order; and

(ii) simultaneously sending a copy of such notice by certified mail to the Secretary.

(B) The Secretary shall file promptly in such court a certified copy of the record on which such violation was found.

(C) A finding of the Secretary shall be set aside only if the finding is found to be unsupported by substantial evidence.

(3)(A) A person who fails to obey a valid cease-and-desist order issued under paragraph (1) by the Secretary, after an opportunity for a hearing, shall be subject to a civil penalty assessed by the Secretary of not more than $500 for each offense.

(B) Each day during which such failure continues shall be considered a separate violation of such order.

(4)(A) If a person fails to pay a valid civil penalty imposed under this subsection by the Secretary, the Secretary shall refer the matter to the Attorney General for recovery of the amount assessed in an appropriate district court of the United States.

(B) In such action, the validity and appropriateness of the order imposing such civil penalty shall not be subject to review.

(c) Availability of additional remedies

The remedies provided in subsections (a) and (b) of this section shall be in addition to, and not exclusive of, other remedies that may be available.

§ 4816. Investigations

(a) Purposes

The Secretary may make such investigations as the Secretary considers necessary—

(1) for the effective administration of this chapter; or

(2) to determine whether a person subject to this chapter has engaged, or is about to engage, in an act that constitutes, or will constitute, a violation of this chapter or an order, rule, or regulation issued under this chapter.

(b) Oaths and affirmations; subpenas

(1) For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry.

(2) Such attendance of witnesses and the production of such records may be required from any place in the United States.

(c) Judicial enforcement; contempt proceedings; service of process

(1) In the case of contumacy, or refusal to obey a subpoena, by a person, the Secretary may invoke the aid of a court of the United States with jurisdiction over such investigation or proceeding, or where such person resides or does business, in requiring the attendance and testimony of such person and the production of such records.

(2) The court may issue an order requiring such person to appear before the Secretary to produce records or to give testimony touching the matter under investigation.

(3) A failure to obey an order issued under this section by the court may be punished by the court as a contempt thereof.

(4) Process in such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.

§ 4817. Preemption

(a) Promotion and consumer education; funds from pork producers

This chapter is intended to occupy the field of—

(1) promotion and consumer education involving pork and pork products; and

(2) obtaining funds therefor from pork producers.

(b) Additional or different State regulation prohibited

The regulation of such activity (other than a regulation or requirement relating to a matter of public health or the provision of State or local funds for such activity) that is in addition to or different from this chapter may not be imposed by a State.

(c) Application of section

This section shall apply only during a period beginning on the date of the commencement of the collection of assessments under section 4809 of this title and ending on the date of the termination of the collection of assessments under section 4811(a)(3) or 4811(b)(1)(B)[1] of this title.

§ 4818. Administrative provision

The provisions of this chapter applicable to orders shall be applicable to amendments to orders.

§ 4819. Authorization of appropriations

(a) There are authorized to be appropriated such sums as may be necessary for the Secretary to carry

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[1] So in original. Probably should be "section 4811(b)(2)(A) or 4812(b)(1)(B)".

out this chapter, subject to reimbursement from the Board under section 4809(c)(3)(B)(iv) of this title.

(b) Sums appropriated to carry out this chapter shall not be available for payment of an expense or expenditure incurred by the Board in administering an order.

APPENDIX D

The Pork Promotion, Research and Consumer Information Order, 7 C.F.R. Part 1230, provides in pertinent part:

DEFINITIONS

§ 1230.1 Act.

Act means the Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4801-4819) and any amendments thereto.

§ 1230.2 Department.

Department means the United States Department of Agriculture.

§ 1230.3 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Secretary's stead.

§ 1230.4 Board.

Board means the National Pork Board established pursuant to § 1230.50.

§ 1230.5 Consumer information.

Consumer information means an activity intended to broaden the understanding of the sound nutritional attributes of pork and pork products, including the role of pork and pork products in a balanced, healthy diet.

§ 1230.6 Council.

Council means the National Pork Producers Council, a nonprofit corporation of the type described in section 501(c)(5) of the Internal Revenue Code of 1954 and incorporated in the State of Iowa.

§ 1230.7 Customs Service.

Customs Service means the United States Customs Service of the United States Department of Treasury.

§ 1230.8 Delegate Body.

Delegate Body means the National Pork Producers Delegate Body established pursuant to § 1230.30.

§ 1230.9 Fiscal period.

Fiscal period means the 12-month period ending on December 31 or such other consecutive 12-month period as the Secretary or Board may determine.

§ 1230.10 Imported.

Imported means entered, or withdrawn from a warehouse for consumption, in the customs territory of the United States.

§ 1230.11 Imported pork and pork products.

Imported pork and pork products means products which are imported into the United States which the Secretary determines contain a substantial amount of pork, including those products which have been assigned one or more of the following numbers in Schedule 1 of the Tariff Schedules of the United States Annotated (1985): 106.4020; 106.4040; 106.8000; 106.8500; 107.1000; 107.1500; 107.3020; 107.3040; 107.3060; 107.3515; 107.3525; 107.3540; and 107.3560.

§ 1230.12 Importer.

Importer means a person who imports porcine animals, pork, or pork products into the United States.

§ 1230.13 Market.

Market means to sell, slaughter for sale, or otherwise dispose of a porcine animal in commerce.

§ 1230.14 Market value.

Market value means, with respect to porcine animals which are sold, the price at which they are sold. With respect to porcine animals slaughtered for the sale by the producer, the term means the most recent annual seven-market average for barrows and gilts, as published by the Department. With respect to imported porcine animals, the term means the declared value. With respect to imported pork and pork products, the term means an amount which represents the value of the live porcine animals from which the pork or pork products were derived, based upon the most recent annual seven-market average for barrows and gilts, as published by the Department.

§ 1230.15 Part and subpart.

Part means the Pork Promotion, Research, and Consumer Information Order and all rules, regulations, and supplemental orders issued thereunder, and the aforesaid order shall be a subpart of such part.

§ 1230.16 Person.

Person means any individual, group of individuals, partnership, corporation, association, organization, cooperative, or other entity.

§ 1230.17 Plans and projects.

Plans and projects means promotion, research, and consumer information plans, studies, or projects.

§ 1230.18 Porcine animal.

Porcine animal means a swine, that is raised as (a) a feeder pig, that is, a young pig sold to another person to be finished for slaughtering over a period of more than 1 month; (b) for breeding purposes as seed stock and included in the breeding herd; and (c) a market hog, slaughtered by the producer or sold to be slaughtered, usually within 1 month of such transfer.

§ 1230.19 Pork.

Pork means the flesh of a porcine animal.

§ 1230.20 Pork product.

Pork product means an edible product produced or processed in whole or in part from pork.

§ 1230.21 Producer.

Producer means a person who produces porcine animals in the United States for sale in commerce.

§ 1230.22 Promotion.

Promotion means any action, including but not limited to paid advertising and retail or food service merchandising, taken to present a favorable image for porcine animals, pork, or pork products to the public, or to educate producers with the intent of improving the competitive position and stimulating sales of porcine animals, pork, or pork products.

§ 1230.23 Research.

Research means any action designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products, including the dissemination of the results of such research.

§ 1230.24 State.

State means each of the 50 States.

§ 1230.25 State association.

State association means the single organization of producers in a State that is organized under the laws of that State and is recognized by the chief executive officer of such State as representing such State's producers. If no such organization exists in a State as of January 1, 1986, the Secretary may recognize an organization that represents not fewer than 50 producers who market annually an aggregate of not less than 10 percent of the pounds of porcine animals marketed in such State. The Secretary may cease to recognize a State association and instead recognize another organization of producers in a State as that State's association if the Secretary determines either that a majority of the members of the existing State association are not producers or that a majority of the members of the other organization seeking recognition are producers and that such organization better represents the economic interests of producers.

§ 1230.26 State where produced.

State where produced means with respect to a porcine animal marketed as a feeder pig or as breeding stock, the State in which that porcine animal was born,

and with respect to a porcine animal that is marketed as a market hog, the State in which that porcine animal was fed for market.

NATIONAL PORK PRODUCERS DELEGATE BODY

§ 1230.30 Establishment and membership.

(a) There is hereby established a National Pork Producers Delegate Body which shall consist of producers and importers appointed by the Secretary.

(b)(1) At least two producer members shall be allocated to each State, but any State that has more than 300 but less than 601 shares shall receive three producer members; each State with more than 600 but less than 1,001 shares shall receive four producer members and each State with more than 1,000 shares shall receive an additional member in excess of four for each 300 additional shares in excess of 1,000 shares, rounded to the nearest 300.

(2) [Reserved]

(3) In each fiscal period, shares shall be assigned to each State on the basis of one share for each $1,000 (rounded to the nearest $1,000) of the net amount of assessments attributable to such State.

(c)(1) The number of importer members to be appointed shall be determined by allocating three such members for the first 1,000 shares. Importers shall receive an additional member in excess of three for each 300 shares in excess of 1,000 shares, rounded to the nearest 300.

(2) [Reserved]

(3) In each fiscal period, shares shall be assigned to importers on the basis of one share for each $1,000

(rounded to the nearest $1,000) of the net amount of assessments attributable to importers.

§ 1230.31 Nomination and appointment of producer members.

(a) [Reserved]

(b) Delegate Body nominations for appointment as producer members shall be submitted to the Secretary in the number requested by the Secretary by each State association either after an election conducted in accordance with § 1230.32 and by nominating the producers who receive the highest number of votes in such State; or pursuant to a selection process that is approved by the Secretary, is given public-notice at least one week in advance by publication in a newspaper or newspapers of general circulation in such State and in pork production and agriculture trade publications, and provides complete and equal access to every producer who has paid all assessments due under this subpart and who has not demanded any refund of an assessment paid pursuant to this subpart in the period since the selection of the previous Delegate Body;

(c) The Secretary shall appoint the producer members of each Delegate Body from the nominations submitted in accordance with this section, except that if a State association does not submit nominations in the required manner or number, or if a State has no State association, the Secretary shall select producer members from that State after consultation with representatives of the pork industry in that State.

§ 1230.32 Conduct of election.

If a State association selects nominees for appointment to the Delegate Body through an election, it shall be conducted in the following manner:

(a) Elections shall be administered by the Board and the Board shall determine the timing of any elections.

(b) Producers who are residents of that State may be named as candidates for election to be nominees for appointment to the Delegate Body:

(1) By a nominating committee of producers in that State appointed by the Board; or

(2) The number of pork producers in a State shall be determined by the Department based on the latest available Department information, which tabulates by State the number of farming operations with porcine animals.

(c) To be eligible to vote in an election to nominate producer members from a State, a person must:

(1) Be a producer who is a resident of that State;

(2) Have paid all assessments due pursuant to this subpart; and

(3) Not have demanded any refund of an assessment paid pursuant to this subpart in the period since the selection of the previous Delegate Body.

(d) The Board shall cause notices of any election to be published at least one week prior to the election in a newspaper or newspapers of general circulation in that State, and in pork production and agricultural trade publications. The notices shall set forth the period of time and places for voting and such other information as the Board considers necessary.

(e) The identity of any person who voted and the manner in which any person voted shall be kept confidential.

§ 1230.33 Appointment of importer members.

The Secretary shall appoint the importer members of each Delegate Body after consultation with importers.

§ 1230.34 Term of office.

(a) The members of the Delegate Body shall serve for terms of one year, except that the members of the initial Delegate Body shall serve only until the completion of the nomination and appointment process of the succeeding Delegate Body.

(b) Each member of the Delegate Body shall serve until that member's term expires, or a successor is appointed, whichever occurs later.

§ 1230.35 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Delegate Body, the Secretary shall appoint a successor for the unexpired term of such member from nominations made either by the appropriate State association or by importers, depending upon whether the vacancy is a producer or importer vacancy.

§ 1230.36 Procedure.

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Delegate Body, but only if that majority is also entitled to cast a majority of the shares (including fractions thereof). Any action of the Delegate Body, including any motion or nomination presented to it for a vote, shall require a

majority vote, that is, the concurring votes of a majority of the shares cast on that action. The Delegate Body shall give timely notice of its meetings. The Delegate Body shall give the Secretary the same notice of its meetings as it gives to its members in order that the Secretary or a representative of the Secretary may attend meetings.

(b) The number of votes that may be cast by a producer member if present at a meeting shall be equal to the number of shares attributable to the State of such member divided by the number of producer members from such State. The number of votes that may be cast by an importer member if present at a meeting shall be equal to the number of shares allocated to importers divided by the number of importer members.

§ 1230.37 Officers.

The Delegate Body shall elect its Chairperson by a majority vote at the first annual meeting, but at each annual meeting after the first, the President of the Board shall serve as the Delegate Body's Chairperson.

§ 1230.38 Compensation and reimbursement.

The members of the Delegate Body shall serve without compensation but may be reimbursed by the Board for actual transportation expenses incurred by them in exercising their powers and duties under this Subpart. Such expenses shall be paid from funds received by the Board pursuant to § 1230.72.

§ 1230.39 Powers and duties of the Delegate Body.

The Delegate Body shall have the following powers and duties:

(a) To meet annually;

(b) To recommend the rate of assessment prescribed by the initial order and any increase in such rate;

(c) To determine the percentage of the net assessments attributable to porcine animals produced in a State that each State association shall receive; and

(d) To nominate not less than 23 persons, including producers from a minimum of 12 States or importers, for appointment to the initial Board and not less than one and one-half persons (rounded up to the nearest person) for each vacancy on the Board that requires nominations thereafter. Each nomination shall be by a majority vote of the Delegate Body voting in person in accordance with § 1230.36.

NATIONAL PORK BOARD

§ 1230.50 Establishment and membership.

There is hereby established a National Pork Board of 15 members consisting of producers representing at least 12 States or importers appointed by the Secretary from nominations submitted pursuant to § 1230.39(d). The Board shall be deemed to be constituted once the Secretary makes the appointments to the Board.

§ 1230.51 Term of office.

(a) The members of the Board shall serve for terms of three years, except that the members appointed to the initial Board shall be designated for, and shall serve terms as follows: One-third of such members shall serve for one year terms; One-third shall serve for two year terms; and the remaining One-third shall serve for three year terms.

(b) Each member of the Board shall serve until the member's term expires, or until a successor is appointed, unless the member is removed pursuant to § 1230.55(b).

(c) No member shall serve more than two consecutive terms provided that those members serving an initial term of one year are eligible to serve two additional consecutive terms, but in no event, more than seven years in total.

(d) The first year of the terms of the initial Board shall begin immediately on appointment by the Secretary and continue until July 1, 1988. In subsequent years, the term of office shall begin on July 1.

§ 1230.52 Nominations.

Nominations for members of the Board shall be made by the Delegate Body in accordance with § 1230.39(d).

§ 1230.53 Nominee's agreement to serve.

Any person nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed;

(b) Disclose any relationship with the Council or a State association or any organization that has a contract with the Board and thereafter disclose, at any time while serving on the Board, any relationship with any organization that applies to the Board for a contract; and

(c) Withdraw from participation in deliberations, decisionmaking, or voting on matters concerning any entity referred to in paragraph (b) of this section, if an

officer or member of the executive committee of such entity.

§ 1230.54 Appointment.

From the nominations submitted pursuant to § 1230.39(d), the Secretary shall appoint 15 producers or importers as members of the Board, but in no event shall the Secretary appoint producer members representing fewer than 12 States.

§ 1230.55 Vacancies.

(a) To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor for the unexpired term of such member from the most recent list of nominations made by the Delegate Body.

(b) If a member of the Board fails or refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that that member be removed from office. If the Secretary finds that the recommendation of the Board demonstrates adequate cause, the Secretary shall remove such member from office. A person appointed under this Part or any employee of the Board may be removed by the Secretary if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act.

§ 1230.56 Procedure.

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Board. Any action of the Board shall require the concurring votes of at least a majority of those present and voting. The Board shall give timely notice of its meetings. The

Board shall give the Secretary the same notice of its meetings, including the meetings of its committees, as it gives to its members in order that the Secretary, or a representative of the Secretary, may attend the meetings.

(b) The Board may take action upon the concurring votes of a majority of its members by mail, telephone, telegraph or by other means of communication when, in the opinion of the President of the Board, such action must be taken before a meeting can be called. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing and recorded in the Board minutes. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board.

§ 1230.57 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for reasonable expenses incurred by them in the exercise of their powers and the performance of their duties under this subpart. Such expenses shall be paid from funds received by the Board pursuant to § 1230.72.

§ 1230.58 Powers and duties of the Board.

The Board shall have the following powers and duties:

(a) To meet not less than annually, and to organize and elect from among its members, by majority vote, a President and such other officers as may be necessary;

(b) To receive and evaluate, or, on its own initiative, develop, and budget for proposals for plans and projects and to submit such plans and projects to the Secretary for approval;

(c) To administer directly or through contract the provisions of this subpart in accordance with its terms and provisions;

(d) To develop and submit to the Secretary for the Secretary's approval, plans and projects conducted either by the Board or others;

(e) To prepare and submit to the Secretary for the Secretary's approval, which is required for the following to be implemented:

(1) Budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including the projected cost of plans and projects to be conducted by the Board directly or by way of contract or agreement; and

(2) The budget, plans, or projects for which State associations are to receive funds under § 1230.72, including a general description of the proposed plan and project contemplated therein;

(f) With the approval of the Secretary, to enter into contracts or agreements with any person for the development and conduct of activities authorized under this subpart and for the payment of the cost thereof with funds collected through assessments pursuant to § 1230.71. Any such contract or agreement shall provide that:

(1) The contracting party shall develop and submit to the Board a plan or project together with a budget or

budgets which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its relevant transactions and make periodic reports to the Board of relevant activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party;

(g) To appoint or employ staff persons as it may deem necessary, to define the duties and determine the compensation of each, to protect the handling of Board funds through fidelity bonds, and to conduct routine business.

(h) To disseminate information to or communicate with producers or State associations through programs or by direct contact utilizing the public postage system or other systems;

(i) To select committees and subcommittees of Board members and to adopt such rules and by laws for the conduct of its business as it may deem advisable;

(j) To utilize advisory committees of persons other than Board members to assist in the development of plans or projects and pay the reasonable expenses and fees of the members of such committees;

(k) To prescribe rules and regulations necessary to effectuate the terms and provisions of this subpart;

(l) To recommend to the Secretary amendments to this subpart;

(m) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1230.71 in, and only in, an obligation of the United States, a general obligation of any State or any political subdivision thereof, an interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or an obligation fully guaranteed as to principal and interest by the United States.

(n) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and prepare and submit such reports as the Secretary may prescribe from time to time, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(o) To prepare and make public and available to producers and importers at least annually, a report of its activities carried out and an accounting of funds received and expended;

(p) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards at the end of each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;

(q) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(r) To submit to the Secretary such information pursuant to this subpart as the Secretary may request; and

(s) To carry out an effective and coordinated program of promotion, research, and consumer information

designed to strengthen the position of the pork industry in the marketplace and maintain, develop, and expand markets for pork and pork products.

PROMOTION, RESEARCH AND CONSUMER INFORMATION

§ 1230.60 Promotion, research, and consumer information.

(a) The Board shall receive and evaluate, or, on its own initiative, develop, and submit to the Secretary for approval, any plans and projects. Such plans and projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate plans and projects for promotion, research, and consumer information with respect to pork and pork products designed to strengthen the position of the pork industry in the marketplace and to maintain, develop, and expand domestic and foreign markets for pork and pork products;

(2) The establishment and conduct of research and studies with respect to the sale, distribution, marketing, and utilization of pork and pork products and the creation of new products thereof, to the end that marketing and utilization of pork and pork products may be encouraged, expanded, improved, or made more acceptable.

(b) Each plan and project shall be periodically reviewed or evaluated by the Board to ensure that the plan and project contributes to an effective and coordinated program of promotion, research, and consumer information. If it is found by the Board that any such plan and project does not further the purposes of the Act, the Board shall terminate such plan and project.

(c) No plan or project shall make a false or misleading claim on behalf of pork or a pork product or a false or misleading statement with respect to an attribute or use of a competing product.

(d) No plan or project shall undertake to advertise or promote pork or pork products by private brand or trade name unless such advertisement or promotion is specifically approved by the Board, with the concurrence of the Secretary.

EXPENSES AND ASSESSMENTS

§ 1230.70 Expenses.

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve that would permit an effective promotion, research, and consumer information program to continue in years when the amount of assessments may be reduced) as the Secretary finds are reasonable and likely to be incurred by the Board for its administration, maintenance, and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart, including financing plans and projects. Such expenses shall be paid from assessments collected pursuant to § 1230.71 and other funds available to the Board, including donations.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1230.71, for reasonable administrative expenses incurred by the Department with respect to this subpart after January 1, 1986, including any expenses reasonably incurred for the conduct of elections of nominees for appointment to the initial Delegate Body and for the conduct of referenda.

§ 1230.71 Assessments.

(a)(1) Each producer producing in the United States a porcine animal raised as a feeder pig that is sold shall pay an assessment on that animal, unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid on that animal as a feeder pig.

(2) Each producer producing in the United States a porcine animal raised for slaughter that is sold shall pay an assessment on that animal, unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid on that animal as a market hog.

(3) Each producer producing in the United States a porcine animal raised for slaughter that such producer slaughters for sale shall pay an assessment on that animal unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid on that animal as a market hog.

(4) Each producer producing in the United States a porcine animal raised for breeding stock that is sold shall pay an assessment on that animal, unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid by a person on that animal as breeding stock.

(5) Each importer importing a porcine animal, pork, or pork product into the United States shall pay an assessment on that porcine animal, pork, or pork product, unless such importer demonstrates to the Board by appropriate documentation that an assessment was previously paid for that porcine animal, pork, or pork product.

(b)(1) Each purchaser of a porcine animal raised by a producer as a feeder pig or market hog shall collect an assessment on such porcine animal if an assessment is due pursuant to paragraph (a) of this section, and shall remit that assessment to the Board. For the purposes of collection and remittance of assessments, any person engaged as a commission merchant, auction market, or livestock market in the business of receiving such porcine animals for sale on commission for or on behalf of a producer shall be deemed to be a purchaser.

(2) Assessments on porcine animals raised as breeding stock which are sold by a commission merchant, auction, market, or livestock market in the business of receiving such porcine animals for sale on commission for or on behalf of a producer shall be collected and remitted by the commission merchant, auction market, or livestock market selling such porcine animals.

(3) Each producer of porcine animals slaughtered for sale by the producer or sold directly to a consumer in connection with a custom slaughter operation shall remit an assessment to the Board if an assessment is due pursuant to paragraph (a) of this section.

(4) Assessments on domestic porcine animals shall be remitted in the form of a negotiable instrument made payable to the "National Pork Board," which, together with the reports required by § 1230.80, shall be sent to the address designated by the Board.

(5) Each importer of a porcine animal, pork, or pork product shall remit an assessment to the Customs Service at the time such porcine animal, pork, or pork product is imported or in such manner as may be established by regulations prescribed by the Board and

approved by the Secretary, if an assessment is due pursuant to paragraph (a) of this section.

(c) The initial rate of assessment shall be 0.25 percent of market value.

(d) The rate of assessment may, upon the recommendation of the Delegate Body, be increased by regulations prescribed by the Board and approved by the Secretary by no more than 0.1 percent of such market value per fiscal period to a total of not more than 0.5 percent of market value.

(e) Assessments on imported pork and pork products shall be expressed in an amount per pound for each type of pork or pork product subject to assessment, which shall be established by regulations prescribed by the Board and approved by the Secretary.

§ 1230.72 Distribution of assessments.

Assessments remitted to the Board shall be distributed as follows:

(a) Each State association shall receive on a monthly basis, a percentage determined by the Delegate Body or 16.5 percent, whichever is higher, of the net assessments attributable to that State. The net assessments attributable to a State is the total amount of assessments received from producers in a State.

(b) A State association which was conducting a pork promotion program in the period from July 1, 1984 to June 30, 1985, shall receive additional amounts at such times as the Board may determine, so that the total amount received on an annual basis would be equal to the amount that would have been collected in such State pursuant to the pork promotion program in existence in such State from July 1, 1984, to June 30,

1985, had the porcine animals subject to assessment, been produced from July 1, 1984, to June 30, 1985, and been subject to the rates of assessment then in effect from such State to the Council and other national entities involved in pork promotion, research, and consumer information. This paragraph shall apply to a State association only if the annual amount determined under this paragraph would be greater than the annual amount determined under paragraph (a) of this section.

(c) The Council shall receive on a monthly basis 35 percent of the net assessments until after the referendum is conducted, and 25 percent thereafter and until 12 months after the referendum.

§ 1230.73 Uses of distributed assessments.

(a) Each State association shall use its distribution of assessments pursuant to § 1230.72, as well as any proceeds from the investment of such funds pending their use, for financing plans and projects and the administrative expenses incurred in connection therewith, including the cost of administering nominations and elections of producer members of the Delegate Body.

(b) The Council shall use its distribution of assessments pursuant to § 1230.72, as well as any proceeds from the investment of such funds pending their use, for financing plans and projects and the Council's administrative expenses.

(c) The Board shall use its distribution of assessments pursuant to § 1230.72, as well as any proceeds from the investment of such funds pending their use, for:

(1) Financing plans and projects;

(2) The Board's expenses for the Board's administration, maintenance, and functioning as authorized by the Secretary;

(3) Accumulation of a reserve not to exceed one fiscal period's budget to permit continuation of an effective promotion, research, and consumer information program in years when assessment amounts may be reduced; and

(4) The Secretary's administrative costs in carrying out this part.

§ 1230.74 Prohibited use of distributed assessments.

(a) No funds collected under this subpart shall in any manner be used for the purpose of influencing legislation as that term is defined in section 4911 (d) and (e)(2) of the Internal Revenue Code of 1954, or for the purpose of influencing governmental policy or action except in recommending to the Secretary amendments to this part.

(b) Organizations receiving distributions of assessments from the Board shall furnish the Board with annual financial statements audited by a certified public accountant of all funds distributed to such organizations pursuant to this subpart and any other reports as may be required by the Secretary or the Board in order to verify the use of such funds.

§ 1230.75 Adjustment of accounts.

Whenever the Board or the Department determines, through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board, such person shall be notified of

the amount due. Any amount due the Board shall be remitted to the Board by the next date for remitting assessments as provided in § 1230.71(b)(3). Any overpayment to the Board shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months except that the Board shall make prompt payment when an overpayment cannot be adjusted by a credit.

§ 1230.76 Charges.

Any assessment not paid when due shall be increased 1.5 percent each month beginning with the day following the date such assessment was due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

§ 1230.77 [Reserved]

REPORTS, BOOKS, AND RECORDS

§ 1230.80 Reports.

Each person responsible for collecting or remitting any assessment under § 1230.71(b) shall report at the

time for remitting assessments to the Board the following information:

(a) The quantity and market value of the porcine animals subject to assessment;

(b) The amount of assessment collected;

(c) The month the assessment was collected;

(d) The State where the porcine animals were produced; and

(e) Such other information as may be required by regulations prescribed by the Board and approved by the Secretary.

§ 1230.81 Books and records.

Each person who is subject to this subpart shall maintain and, during normal business hours, make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provision of this subpart, including such records as are necessary to verify any required reports. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

§ 1230.82 Confidential treatment.

All information obtained from the books, records or reports required to be maintained under §§ 1230.80 and 1230.81 of this subpart shall be kept confidential by all persons, including employees and agents and former employees and agents of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and all employees and all former officers and employees of contracting parties having access to such information, and shall not be available to Board members. Only those persons hav-

ing a specific need for such information in order to effectively implement, administer, or enforce the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired shall be disclosed as the Secretary deems relevant and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of a number of persons subject to this subpart or of statistical data collected therefrom, which statements or data do not identify the information furnished by any person; or

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of this subpart violated by such person.

MISCELLANEOUS

§ 1230.85 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of, the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreement;

(3) From time to time account for all receipts and disbursements and deliver all property on hand together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the plans and projects authorized pursuant to this subpart.

§ 1230.86 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant hereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may hereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, the Secretary, or any person with respect to any such violation.

§ 1230.87 Personal liability.

No member or employee of the Board shall be held personally liable, either individually or jointly, in any way whatsoever to any person for errors in judgment, mistakes, or other acts of either commission or omission, as such member or employee, except for acts of dishonesty or willful misconduct.

§ 1230.88 Patents, copyrights, inventions, and publications.

Any patents, copyrights, trademarks, inventions, or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the United States Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications inure to the benefit of the Board as income and be subject to the same fiscal, budget, and audit controls as other funds of the Board. Upon termination of this subpart, § 1230.85 shall apply to determine disposition of all such property.

§ 1230.89 Amendments.

The Secretary may from time to time amend provisions of this part. Any interested person or organization affected by the provisions of the Act may propose amendments to the Secretary.

§ 1230.90 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1230.91 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in this Subpart have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter and have been assigned OMB Control Number 0851-0151.

* * * * *

(2) (2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Nos. 03-1180 and 03-1043

IN THE

Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Petitioners,

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

MICHIGAN PORK PRODUCERS ASSOCIATION, INC., ET AL.,

Petitioners,

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RULE 29.6 STATEMENT

The Campaign for Family Farms is an unincorporated association. No parent or publicly owned corporation owns 10 percent or more of the stock of the Campaign for Family Farms.

PARTIES TO THE PROCEEDINGS BELOW

The United States petitioners in this case are Ann Veneman, Secretary, United States Department of Agriculture, and the United States Department of Agriculture. The private petitioners include the Michigan Pork Producers Association, Inc., California Pork Producers Association, Kentucky Pork Producers Association, Indiana Pork Producers Association, New York Pork Producers Cooperative, Inc., Ohio Pork Producers Council, High Lean Pork, Inc., Pete Blauwiekel, and Bob Bloomer.

The respondents in this case are the Campaign for Family Farms, James Dale Joens, Richard Smith, Rhonda Perry, and Larry Ginter.

The National Pork Producers Council was a party in the proceedings below.

The United States's petition erroneously listed the Cattlemen's Beef Promotion and Research Board as a party to the proceeding in this case.

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STATEMENT OF THE CASE

In the three years since this Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the courts of appeals have all reached the same conclusion: mandatory agricultural assessment programs violate the First Amendment of the U.S. Constitution. The Sixth Circuit's decision in this case striking down the Pork Promotion, Research, and Consumer Act, 7 U.S.C. § 4801 *et seq.* (the "pork checkoff" or "Pork Act"), is entirely consistent with the recent decisions of the Third, Fifth, and Eighth Circuits regarding other checkoff programs. *Livestock Marketing Ass'n v. United States Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed* (Feb. 13, 2004) (Nos. 03-1164 and 03-1165) ("*LMA*") (beef checkoff); *see also Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004) (dairy checkoff); *Pelts & Skins, LLC v. Landreneau*, No. 03-30523, 2004 U.S. App. LEXIS 6364 (5th Cir. Apr. 2, 2004) (Louisiana alligator checkoff).

The United States and private petitioners[1] argue that this Court should revisit the constitutionality of checkoff programs, since *United Foods* did not consider the claim that these programs are somehow immune from First Amendment scrutiny because they involve "government speech." But that claim has been squarely rejected by all four courts of appeals that have considered checkoff programs. *See* Appendix to the U.S. Petition for Certiorari ("U.S. Pet. App.") 8a; *LMA*, 335 F.3d at 720; *Cochran*, 359 F.3d at 268; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *15. Thus, petitioners have

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[1] Two petitions for certiorari have been filed in this case. For ease of reference, we refer to the petitioners in No. 03-1180 as "the United States" and to the petitioners in No. 03-1043 as "the private petitioners." Respondents address herein facts that bear on issues that would properly be before this Court if certiorari were granted, but do not address the array of inflammatory and sometimes false statements of facts asserted by the private petitioners.

presented no compelling reason for this Court to grant certiorari in either of the now-pending cases. If, however, the Court decides to hear either case, it should hear both in order to resolve the constitutionality of these programs once and for all.

1. Respondents are the Campaign for Family Farms (CFF) – a coalition of family farm organizations with hundreds of hog farmer members – and four individual hog farmers. CFF's mission is to ensure the continued existence of family farms in the face of increasing industrialization of agriculture.[2] U.S. Pet. App. 14a, 18a. Respondents oppose the mandatory pork checkoff because its objectionable ideological speech is aligned with policies that have had a devastating economic effect on family farms and the rural communities they support. *Id.* 18a.

2. The Norman Rockwell image of rural America is rapidly disappearing as the number of farms shrinks, the size of farms grows, and ownership and management of agricultural operations is consolidated in the hands of a shrinking number of individuals and corporations.[3] Those farmers who do raise hogs are increasingly raising them not as independent producers, but on behalf of others, usually a

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[2] CFF filed an *amicus* brief with this Court in *United Foods* urging affirmance of the Sixth Circuit's ruling.

[3] USDA statistics show the steady exit of independent hog farmers from the hog industry over the past twenty years. C.A. App. 822. In the mid-1980s, prior to the enactment of the pork checkoff, there were approximately 500,000 hog farms in the nation. As of year-end 2002, that number had shrunk to 75,350 hog operations. *Id.* 1194, C.A. Addendum 1. While the number of hog farms has declined, the total number of hogs produced has remained relatively stable, resulting in increasingly large hog operations. *See* William D. McBride & Nigel Key, *Economic and Structural Relationships in U.S. Hog Production—Agricultural Economic Report No. 818*, at 5 (Feb. 2003), *available at* http://www.ers.usda.gov/publications/aer818/aer818.pdf.

packer or packer affiliate.[4] Combined with this increasing vertical integration in hog production is continued corporate consolidation of processing capacity.[5] Independent hog farmers are being left without a competitive market in which to sell their hogs, driving them out of business or into unfavorable contracts with packers. *See, e.g.*, Neil E. Harl, *The Structural Transformation of Agriculture* 4-5 (Mar. 20, 2003), *available at* http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf.

The hog industry reached a watershed moment at the end of 1998 and beginning of 1999, when hog prices hit record lows and hog farmers could not break even.[6] Geoffrey S. Becker, *Hog Prices: Questions and Answers*, Congressional Research Service (updated Dec. 15, 1999), *at* http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-68.cfm. During this crisis, more than 15,000 hog farmers quit producing hogs. USDA National Agricultural Statistics Service, *Hogs and Pigs Report* 21 (Dec. 28, 1999), *at*

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[4] A 2002 National Pork Board (NPB) study showed that more than 83% of hogs at that time were committed to packers before slaughter through packer ownership or contractual arrangements, up from 38% in 1994. C.A. App. 1248.

[5] In 2000, four firms controlled 56% of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001*, at 18, 38 (June 2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf. Smithfield, the nation's largest processor, recently acquired Farmland Industries, which only increased the consolidation of processing power. *See, e.g.*, Written Testimony of the Organization for Competitive Markets presented to the U.S. Senate Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights (July 23, 2003), *at* http://judiciary.senate.gov/testimony.cfm?id=869&wit_id=2452.

[6] While hog prices were at record lows, retail pork prices did not decline accordingly and processors like Smithfield posted near-record profits. *See* Joseph W. Luter, III, *To Our Shareholders*, Smithfield Foods, Inc., 2000 Annual Report 3 (July 7, 2000), *available at* http://www.smithfieldfoods.com/Investor/pdf/sfd_ar00.pdf.

http://usda.mannlib.cornell.edu/reports/nassr/livestock/phpbb/1999/hgpg1299.pdf.

Throughout this period of consolidation and record low prices, a private commodity group, the National Pork Producers Council (NPPC), acted as the general contractor for the $50 million annual pork checkoff. Many hog farmers, including respondents, sharply disagreed with being associated with the tactics and policies pursued by NPPC. For example, in response to the 1998 hog crisis, NPPC's CEO told producers to expand and seize the market share left by the hog farmers being driven out by the record low hog prices. Rod Smith, *'Clear Picture' Emerging for Pork Producers; Choices and Opportunities Ahead Are 'Staggering,'* Feedstuffs, Vol. 70, No. 44 at 23, Oct. 26, 1998. This comment, seen by many as reflecting NPPC's alignment with industrialized agriculture, drove thousands of hog farmers to sign petitions calling for a referendum to terminate the checkoff program.

3. The origins of this case stem from respondents' collection and submission to USDA of those petitions.[7] Based on the petitions, Agriculture Secretary Glickman ordered a referendum that was held in August and September 2000. *See Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (W.D. Mich. 2001) ("*MPPA*"). On January 11, 2001, Secretary Glickman announced that "15,951 producers disfavored the Program and 14,396 producers favored the Program," and issued an order terminating the checkoff. U.S. Pet. App. 17a. Private petitioners and NPPC filed suit, challenging both the counting of the votes and the legal basis for terminating the program.

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[7] NPPC attempted to obtain the names and addresses of the hog farmers who had signed the referendum petitions through a Freedom of Information Act request. CFF filed suit against USDA to block release of the information, and the Eighth Circuit ordered a permanent injunction to protect the hog farmers' privacy. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000).

Respondents intervened in support of the referendum and termination decisions. In February 2001, newly appointed Agriculture Secretary Veneman reversed Secretary Glickman's decision to terminate the pork checkoff. *MPPA*, 174 F. Supp. 2d at 639. Secretary Veneman settled the suit with the private petitioners through an agreement to continue the pork checkoff, albeit with a change in how it would be administered. U.S. Pet. App. 17a. Respondents then filed cross-claims against USDA.

In December 2001, the district court upheld Secretary Veneman's decision to continue the pork checkoff as within her discretion. *MPPA*, 174 F. Supp. 2d at 648. After *United Foods*, respondents added cross-claims alleging violations of their First Amendment rights of freedom of speech and association.

4. On October 25, 2002, the United States District Court for the Western District of Michigan granted respondents' motion for summary judgment on their constitutional claims, holding that the pork checkoff, like the mushroom checkoff, was "unconstitutional and rotten," and violated respondents' First Amendment rights of free speech and association. U.S. Pet. App. 55a. The district court then enjoined operation of the pork checkoff. *Id.* 53a. In response to the petitioners' argument that the program was immune from First Amendment scrutiny under the "government speech" doctrine, the district court held that the program was not in fact government speech; rather, it was "a self-help program for pork producers." *Id.* 47a. The district court acknowledged the Secretary's participation in the workings of the National Pork Board (NPB), but determined that "this involvement does not translate the advertising and marketing in question into 'government speech' as the federal courts have interpreted that term. You cannot make a silk purse from a sow's ear. This defense fails as a matter of law." *Id.*

The district court recognized that respondents and the hog farmers they represent have "sincere philosophical, political

and commercial" objections to the mandatory pork checkoff. *Id.* 50a. The court noted the "frustration" of independent farmers who object to all aspects of the pork checkoff because it supports a system of agriculture that is anathema to their core beliefs about what agriculture is and should be. *Id.* 51a. Put simply, respondents object to paying to support a system they believe is driving them out of existence. *See id.* 18a-19a.

Furthermore, the district court acknowledged that respondents have clearly and consistently articulated their economic and ideological objections to every aspect of the pork checkoff, including the generic promotion of pork. First, generic advertising fails to distinguish the unique qualities and attributes of hogs raised by independent family farmers. *Id.* 19a. Second, generic advertising promotes an industrialized method of production that respondents oppose. The "Pork. The Other White Meat" slogan is intended to create a demand for lean pork that comes from hogs raised in what respondents believe are unhealthy and inhumane conditions. *Id.* Third, generic advertising promotes a product respondents do not sell. Hog farmers sell hogs, not pork. Packers and retailers sell pork. *Id.* Fourth, because the checkoff promotes a product they do not sell, respondents do not benefit from it. *Id.*

Moreover, the district court validated respondents' objections to other aspects of checkoff promotion campaigns. In addition to generic advertising, the checkoff has also funded "branded advertising," which promotes the products of particular packers and retailers. *Id.* 20a. Because packers own their own hogs in growing numbers, through checkoff-funded branded advertising hog farmers are in fact forced to pay for the advertising of their direct competitors. *Id.*[8] The packers whose advertising budgets are being subsidized by hog farmers are also direct competitors of hog farmers such as

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[8] One checkoff-funded "branded" radio ad promoting Hormel pork ran in Colorado, where Hormel owns 25,000 sows. C.A. App. 439, 494-97.

respondents Joens and Perry, who have joined with other hog farmers to slaughter their own hogs and market their pork. *Id.*

Respondents' objections to the other aspects of the pork checkoff – the "research" and "consumer information" portions – are equally ardent. They believe the "information" made available to consumers promotes and encourages consumers to participate in a system respondents abhor. For example, respondent Jim Joens objects to the pork checkoff's consumer information projects on "animal welfare":

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large corporate confinement facilities.

Id. Respondent Richard Smith similarly objects to being compelled to pay for "education" of producers:

> These programs are for people that work in the corporate hog factories that have never seen a hog before they went to work for a huge conglomerate. I object because this is independent producer money going to a program that is focused on corporate hog factories and not the independent producers who believe in animal husbandry and who have been handling hogs humanely for years. I don't believe in giving shots unless we have to. If a hog is sick then I vaccinate it or give it a shot and so I think we have a cleaner hog. These programs are for the education of factory producers.

Id. 20a-21a.

As highlighted by the district court, the research funded by the pork checkoff is just as ideologically abhorrent to independent hog farmers. A primary focus of checkoff-funded research is in the area of what the checkoff terms "Antimicrobial Resistance and Alternatives Research," meaning the continuous feeding of subtherapeutic levels of

antibiotics to hogs to promote growth and prevent disease. *See id.* 21a; National Pork Board, *Pork Checkoff Report*, Vol. 22 No. 1, 10-13 (Winter 2003), *available at* http://www.porkboard.org/docs/porkcheckoffQtr12003.pdf. Respondent Rhonda Perry, like many independent hog farmers, opposes this practice and strongly objects to funding and being associated with this research and the industrialized method of agriculture it promotes through checkoff communications:

> I object to NPB using my checkoff dollars to convince the public and policymakers that the pork industry as a whole is looking out for the health of the general public. Subtherapeutic antibiotic usage has become general industry practice in factory farm production. Many people are increasingly aware of the problems being created by these practices. That is why we have standards for Patchwork Family Farms [the entity through which she processes and markets her hogs] that limit the use of antibiotics. It appears to me as though checkoff dollars are being used to "convince" people that constant feeding of subtherapeutic antibiotics is not a significant problem or at least to fund research to show that it isn't a problem.

See U.S. Pet. App. 21a; C.A. App. 159.

Finally, the district court rejected petitioners' arguments that the remedy should be applied only to respondents, ruling that so limiting the injunction would "essentially re-write the Act in a manner inconsistent with judicial interpretation," since the Pork Act does not allow voluntary participation. *Id.* 52a-53a. The district court declared the Pork Act unconstitutional and enjoined the collection of assessments and the operation of the pork checkoff. *Id.* 53a.

5. Petitioners appealed. The Sixth Circuit initially stayed the injunction, and then affirmed the district court. *Id.* 12a. The court of appeals determined that the Pork Act "is nearly identical in purpose, structure, and implementation to the

Mushroom Act." *Id.* 10a. Like the other courts of appeals that have considered checkoff programs, the Sixth Circuit followed this Court's clear precedent in *United Foods* and ruled the Pork Act unconstitutional.

Addressing the principal issue left open by this Court in *United Foods*, the Sixth Circuit affirmed the district court's ruling that the pork checkoff cannot be saved by the government speech doctrine, given the "pork industry's extensive control" over the program. *Id.* 8a. The court of appeals based its ruling on several factors. First, it found that the primary purpose of the Pork Act is to market pork and strengthen the pork industry. *Id.* Second, the court of appeals found that the program is funded not by general tax revenues, but rather from mandatory assessments paid by pork producers. The court of appeals noted that not only does the Pork Act prohibit the use of government funds for the checkoff, but the Secretary and her staff are actually reimbursed from the assessments for any time or expenses related to the program. *Id.* Third, the Sixth Circuit found that the government's oversight of the checkoff is limited, concluding:

> In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.

Id. 9a.

The Sixth Circuit rejected petitioners' attempt to distinguish this case from *United Foods* by claiming that most of the funds collected under the Mushroom Act were used for generic advertising, while only a small percentage of the pork checkoff funds were so used. The record showed that at least fifty-one percent of the 2001 budget was listed under the category of "Demand Enhancement," which includes many forms of promotion. *Id.* 11a. Moreover the Sixth Circuit

affirmed the district court's finding that the pork checkoff-funded programs for "education" and "research" "were designed to further the Act's promotional goals." *Id.* 12a. Accordingly, the court of appeals concluded that "the Pork Act serves but one purpose: promotion." *Id.* Thus, compelled assessments are unconstitutional under *United Foods*.

Finally, the Sixth Circuit also rejected the argument (preserved by the United States in a single footnote in its appellate brief) that the case should be analyzed under the test for restrictions on commercial speech set forth in this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). U.S. Pet. App. 12a. The court of appeals distinguished this case from cases governed by *Central Hudson* because "[t]he Pork Act does not directly limit the ability of pork producers to express a message; it *compels* them to express a message with which they do not agree." *Id.* (emphasis added). *Central Hudson* has never been applied to a case involving compelled speech. *Id.* (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474 n.18 (1997)). The court noted: "It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.*

6. The Solicitor General has filed petitions for certiorari in this case and in a parallel case in which the Eighth Circuit declared the beef checkoff unconstitutional. *Veneman v. Livestock Marketing Ass'n*, No. 03-1164 (filed Feb. 13, 2004). This Court should deny certiorari in both cases, but if it grants certiorari in either case, it should grant the government's petition in both cases and set them for oral argument together.

ARGUMENT

The petition for a writ of certiorari should be denied. Petitioners ask this Court to grant certiorari on an issue on which there is no conflict among the federal courts of appeals. Following this Court's decision in *United Foods*, four courts of appeals have found an array of checkoff programs

unconstitutional. *See* U.S. Pet. App. 14a (6th Cir. 2003) (pork checkoff); *LMA*, 335 F.3d 711 (8th Cir. 2003) (beef checkoff); *Cochran*, 359 F.3d 263 (3d Cir. 2004) (dairy checkoff); *Pelts & Skins*, 2004 U.S. App. LEXIS 6364 (5th Cir. 2004) (Louisiana alligator checkoff). Each of those courts considered and unequivocally rejected the government speech argument raised by petitioners here. No court of appeals has come to a contrary conclusion. There being no conflict among the circuits, there is no compelling reason for this Court to grant the petitions. *See* S. Ct. R. 10(a).

That there remain issues not addressed by this Court relating to these commodity promotion programs is due entirely to the government's choice of litigation tactics. In the two commodity promotion cases this Court has already decided, the government either waived the government speech argument, *Wileman Bros.*, 521 U.S. at 482 n.2, or failed to raise it in the court of appeals, *United Foods*, 533 U.S. at 416-17. As to the government's newfound argument that these compelled speech cases should be governed by *Central Hudson* (*see* U.S. Pet. 19 n.3), the government has twice declared to this Court that *Central Hudson* should *not* apply to such programs. *See* C.A. App. 1341-42 (arguing in *United Foods* that "the *Central Hudson* test, which involves a restriction on commercial speech, should [not] govern a case involving the compelled funding of speech") (brackets in original); U.S. Br. 14-15, *Goetz v. Glickman*, 525 U.S. 1102 (1999) (No. 98-607) (asserting: "As the Court made clear in *Wileman Bros.*, *Central Hudson*, a case involving a *restriction* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech.") (emphasis in original). In the instant case, the United States did not even argue to the Sixth Circuit that *Central Hudson* should be applied; it simply preserved the argument in a footnote in its brief. U.S. C.A. Br. n.3. The government should not be permitted to burden this Court by creating a moving target, raising and waiving issues without end.

Petitioners' arguments for review are also inappropriate because they largely seek review of factual, rather than legal conclusions. *See* S. Ct. R. 10. In arguing that the lower courts were wrong in not applying the government speech doctrine, petitioners primarily take issue with the district court and court of appeals' characterizations of how the program operates in fact. *See, e.g.*, U.S. Pet. 13-15. Such asserted errors do not warrant this Court's review.

If, however, this Court grants certiorari in either this case or *LMA*, it should grant it in both cases. The federal and state governments have enacted a number of commodity checkoff programs of this type; thus far, review of these programs has been conducted on a case-by-case basis with the United States often taking fundamentally inconsistent positions in different cases. This Court's consideration of how such programs operate across different factual contexts will assure a widely applicable final resolution of the First Amendment questions they present.

I. This Court Should Not Grant Certiorari Because the Ruling Below Was Correct.

The Sixth Circuit's holding is compelled by this Court's decision in *United Foods*. None of the arguments raised by petitioners – that the program is immune from First Amendment scrutiny because it is government speech, that the claims should be governed by the more relaxed standard set forth by this Court in *Central Hudson*, or that the injunction is overly broad – warrants Supreme Court review. Because the mandatory assessments under these checkoff programs are just as unconstitutional now as they were in June 2001 when this Court decided *United Foods*, the petitions for certiorari should be denied.

A. The Pork Checkoff Is Not Government Speech.

The Sixth Circuit's holding that the pork checkoff cannot be sustained under the government speech doctrine is both correct and consistent with the holdings of its sister circuits

and this Court's rulings. Because there is no conflict among the circuits or with any decision of this Court, petitioners demonstrate no compelling reason for this Court to grant certiorari on this issue.

1. The Pork Checkoff Is a Private Self-Help Program.

The pork checkoff was enacted in 1995 as a stand-alone industry "self-help" program, along with several other such programs. U.S. Pet. App. 47a; S. Rep. No. 99-145, 99th Cong., 1st Sess. 331 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 1997; H.R. Rep. No. 99-271, 99th Cong., 1st Sess. 190 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1294; 131 Cong. Rec. S16,090 (1985); C.A. App. 2203, 2237; 7 U.S.C. §§ 4801-4819. Congress itself has stated that commodity promotion programs, such as the pork checkoff and the beef checkoff, are intended to be "'self-help' mechanisms for producers and processors to fund generic promotions for covered commodities." 7 U.S.C. § 7401(b)(8). Throughout the pork checkoff's existence, all checkoff-funded communications have told producers and the world that the checkoff is run by and for producers. *See, e.g.*, C.A. App. 2200, 2237. Checkoff ads proclaim that they are brought to you by "America's Pork Producers." *Id.* 724.

The pork checkoff is run entirely by private pork producers, not the government. The Pork Act itself endows NPB, not the government, with the powers and duties of developing checkoff-funded projects. 7 U.S.C. § 4808(b)(1). NPB members are not considered government employees, C.A. App. 1367, and they are reimbursed for their expenses from the collected assessments. 7 U.S.C. § 4808(a)(1)(6). NPB's Executive Vice President admitted that NPB "is not to be considered as a governmental entity/agency or a government contractor." U.S. Pet. App. 3a-4a.[9]

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[9] Private state pork associations receive approximately 20% of all checkoff assessments. 7 U.S.C. § 4809(c)(1); *id.* § 4806(g). The Secretary

The Pork Act specifically prohibits government regulation of the pork industry. It prohibits the imposition of quality standards and control of production of pork or pork products. 7 U.S.C. § 4801(b)(3).

Nothing in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), suggests that NPB is a government agency. In *Lebron*, this Court found that Amtrak (which is subsidized with government funds) is an agency of the government for purposes of analyzing whether it had restrained an individual's speech in violation of the First Amendment. *Id.* at 394. That decision explicitly did not extend to the issue of whether an entity is a government agency for purposes of creating a "privilege" of the government. *Id.* at 399.

The fact that checkoff programs were enacted to help the private industries they promote has been a significant factor in each of the decisions of the courts of appeal declaring the various checkoff programs unconstitutional. *See* U.S. Pet. App. 8a-9a (pork); *Cochran*, 359 F.3d at 270-71 (dairy); *LMA*, 335 F.3d at 725-26 (beef); *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *22 (Louisiana alligator checkoff). In light of these clear rulings, there is no good reason for this Court to grant certiorari on this issue.

2. The Pork Checkoff Is Privately Funded.

The Sixth Circuit also held that pork checkoff-funded speech cannot be government speech because the pork checkoff must be conducted "at no cost to the Federal Government." U.S. Pet. App. 4a (quoting 7 U.S.C. § 4801(b)(2)). That holding follows the guidance this Court has provided on government speech which shows that, to be considered government speech, the speech in question must, at a minimum, be funded by the government. In *Keller v.*

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has no role in appointing or approving the leadership of the state associations. 7 U.S.C. § 4802(16); 7 C.F.R. § 1230.25.

State Bar of California, 496 U.S. 1 (1990), this Court rejected application of the "so-called government speech doctrine," in part because the bar association was funded by dues paid by members of the bar and not appropriations from the legislature. *Id.* at 10-11.

Statements in this Court's other cases likewise support the Sixth Circuit's holding that the underpinning of the government speech doctrine is government funding. In *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000), the Court indicated that for government speech analysis to apply, one prerequisite would be that the speech be "financed by tuition dollars" rather than through the compelled student activity fee. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), the Court's dicta regarding government speech plainly referred only to instances "[w]hen the government disburses public funds."

In cases where this Court *has* found that an activity involves government speech, the speech in question was unquestionably funded with government expenditures. In *Rust v. Sullivan*, 500 U.S. 173 (1991), for example, this Court upheld regulations that restricted what doctors who worked for Title X-funded programs could say about abortions while performing work for those government-funded programs. *Id.* at 193; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (upholding regulations concerning criteria for federal grant recipients).

The consistent teaching of these cases is that the government is free to speak its own message when it funds that message itself. The Sixth Circuit thus was correct in rejecting petitioners' argument that the pork checkoff is immune from First Amendment scrutiny as government speech, since the program's funding does not and cannot come from general tax revenues. U.S. Pet. App. 8a; 7 U.S.C. § 4801(b)(2). Indeed, the government must be reimbursed

from checkoff funds for any oversight it provides. U.S. Pet. App. 8a; 7 C.F.R. § 1230.73(c)(4).

The United States makes the incorrect and misleading assertion that the pork checkoff is merely a type of modest "user fee," U.S. Pet. 11, imposed on those who have "chosen" to be hog farmers, *id.* 10. That argument is without merit for two reasons. First, payers of "user fees" are volunteers: they choose, for example, to visit a national park or to use a particular service for which they are charged a fee. But, like the public employees in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and the lawyers in *Keller*, the mandatory assessments of the pork checkoff are imposed on hog farmers as a condition of earning their livelihood. Second, payers of "user fees" get something in return for the fee, such as a service, and the fee generally is germane to a legitimate non-speech activity. The only thing hog farmers receive in return for the mandatory pork checkoff is objectionable speech. In all of the cases cited by the United States for the novel argument that the pork checkoff assessments are a form of "user fees," the "fees" were actually a reimbursement to the government to cover its administrative expenses. *See United States v. Sperry Corp.*, 493 U.S. 52 (1989) (involving a "user fee" reimbursing the government for administrative expenses incurred in connection with the Iran-United States Claims Tribunal); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) (considering whether school boards could require students who use bus service to pay for that bus service); *Cox v. New Hampshire*, 312 U.S. 569, 570-71 (1941) (upholding local government's imposition of a reasonable fee to compensate for administrative and law-enforcement expenses, noting the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed"). The pork checkoff, by contrast, is not imposed to cover administrative expenses pertaining to a government function;

rather, the money goes into the coffers of private organizations and pays for their highly objectionable speech.

3. The Government Exercises Only *Pro Forma* Oversight.

One of the reasons this Court did not address the issue of whether checkoff-funded speech is government speech in *United Foods* was that, by failing to raise the argument sooner, the government had "deprived respondent of the ability to address significant matters that might have been difficult points for the government," such as whether the Secretary's approval of the advertising was "*pro forma*." 533 U.S. at 416-17. Addressing that exact issue, the Third, Fifth, and Sixth Circuits all found that the respective checkoff programs at issue lacked sufficient USDA oversight to be considered government speech. *See* U.S. Pet. App. 8a; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *20; *Cochran*, 359 F.3d at 274.

To the extent that petitioners challenge the Sixth Circuit's decision that the government exercises only "limited oversight" over the pork checkoff programs, U.S. Pet. App. 9a, they seek factual, rather than legal review. The court of appeals based its conclusion on the following facts: 1) USDA has only one staff member to perform all pork checkoff-related duties; 2) the government does not draft or propose any of the advertisements funded by the pork checkoff; 3) the trademark for "Pork. The Other White Meat" is owned by a private organization, not the government; and 4) NPB is comprised of private pork producers, who are nominated by state pork associations, which are entirely private and not appointed by the Secretary. *Id.* The Sixth Circuit concluded that "the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government." *Id.* 8a; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *20.

4. There Is No Conflict Among the Circuits Regarding the Application of the Government Speech Doctrine to Commodity Checkoffs.

The United States's argument that this Court should grant certiorari because the courts of appeal "did not rely on any consistent rationale" misses the point that those courts all reached the same result: the checkoffs cannot be sustained under the government speech doctrine. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his court reviews judgments, not opinions."). Moreover, the United States's reliance on the Third Circuit's statement from 1989 that "the issue [is] a close one" and there are "sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute 'government speech,'" U.S. Pet. 16 (citing *United States v. Frame*, 885 F.2d 1119, 1131-32 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990)), is no longer warranted. On February 24, 2004, the Third Circuit affirmed the conclusion in *Frame* that checkoff-funded speech is subject to First Amendment scrutiny. *Cochran*, 359 F.3d at 274.

B. The Pork Checkoff Is Unconstitutional Under Any Standard.

The refusal of the court of appeals to apply *Central Hudson* to this compelled speech case is not a basis for granting certiorari. First, the ruling is correct; as the government itself has recognized, *Central Hudson* is not the applicable test in a compelled speech case. *See supra* at 12. Second, even if *Central Hudson* were applicable, the pork checkoff would be unconstitutional. This Court said as much in *United Foods* when, in discussing whether or not the *Central Hudson* test was applicable, it stated: "We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* [*v. Wileman Bros.*] or our other precedents to sustain the compelled assessments sought in this case." 533

U.S. at 410. This Court need not grant certiorari to address a legal issue of negligible effect.

1. *Central Hudson* Is Inapplicable.

The Sixth Circuit correctly ruled that *Central Hudson* does not apply to a case involving compelled speech. As this Court stated in *Wileman Bros.*, courts should *not* "rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising." 521 U.S. at 474. The Court further noted: "The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech." *Id.* at 474 n.18.

Moreover, the more lenient standard of analysis set forth in *Central Hudson* applies only to commercial speech, which is defined as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. The speech at issue here does not fall into this narrow category. The district court characterized the hog farmers' objections as "sincere *philosophical, political* and commercial disagreements," likening them to the objecting bar members in *Keller*. U.S. Pet. App. 50a (emphasis added). Thus, even if *Central Hudson* were applicable to compelled speech concerning "solely . . . economic interests," it would nevertheless be inapposite here.

2. Even If Central Hudson Applied, There Would Be No Basis to Sustain the Checkoff.

Even if the *Central Hudson* test does apply, the pork checkoff cannot pass muster. *Central Hudson* holds that the government may regulate commercial speech only if: (1) "the asserted governmental interest is substantial," (2) "the regulation directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. The three circuit courts that examined the government's purported

interest in the stand-alone checkoff programs have agreed that it is not sufficiently substantial to justify the infringement on producers' First Amendment rights. *See LMA*, 335 F.3d at 725-26; *Cochran*, 359 F.3d at 279; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *30 n.21.[10] The pork checkoff likewise is unconstitutional under *Central Hudson*.

a. The Governmental Interest Is Not Substantial.

Petitioners are wrong that "the welfare of pork producers" is a sufficiently important government interest to justify the compelled assessments. First, as the Third Circuit noted in *Cochran*, "promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's." 359 F.3d at 279. The same is true of the parallel Pork Act.

Second, in addition to the pork checkoff, the government also has enacted similar generic promotion programs to promote products that compete with pork, such as beef.[11] That

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[10] The Third Circuit's decision in *Cochran*, which was issued after petitioners filed their petitions for certiorari, refutes petitioners' argument that the Sixth Circuit's decision in this case is somehow inconsistent with the Third Circuit's decision in *Frame*. Prior to this Court's decisions in *Wileman Bros.* and *United Foods*, the Third Circuit had held in *Frame* that the beef checkoff was constitutional under *Central Hudson*. 885 F.2d at 1134. But in *Cochran*, the Third Circuit reconsidered its prior decision in light of this Court's intervening pronouncements. It discussed the different rationales courts have used to analyze commodity promotion programs, including the approach it used in *Frame*. The Third Circuit concluded that the different approaches made little difference since, in the end, *United Foods* governs. 359 F.3d at 279-80. The court in *Cochran* noted: "We reach this conclusion whether accepting the standard explicitly expressed in *Frame* or deciding that in view of the Court's discussion in *United Foods*, that standard is not [*sic*] longer controlling." *Id.* at 279 n.13.

[11] For instance, NPB, in its pork checkoff communications, identifies beef as being in competition with pork. C.A. App. 2254-86. At the same time, the Cattlemen's Beef Board, in its beef checkoff communications, maintains that beef has more of a potentially beneficial food compound

the beef and pork checkoffs are working at cross-purposes undermines any claim that the government has a "substantial interest" in promoting pork specifically. *See Livestock Marketing Ass'n v. United States Department of Agriculture*, 207 F. Supp. 2d 992, 1006 (N.D.S.D. 2002) ("After all, is the 'government message' therefore that consumers should eat no other product [other than beef] or at least reduce the consumption of other products such as pork, chicken, fish or soy meal?"); *see also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999) (striking under *Central Hudson* a federal restriction on advertising related to casino gambling in part because Congress allowed other forms of gambling to flourish). By authorizing multiple, competing checkoffs, Congress is not promoting the welfare of pork producers; rather, it is promoting the interest of competing industry groups like private petitioners that receive funding from commodity checkoffs.

b. The Pork Checkoff Does Not Directly Advance Any Asserted Governmental Interest.

Even if the two other interests the United States identified as served by the Pork Act – namely, "stabilizing the general economy of the United States," or "ensuring that the people of the United States receive adequate nourishment" – can be considered substantial in some circumstances, the government does not meet its "burden of showing that the challenged regulation advances the Government's interest in a direct and material way. That burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

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than pork and that beef tops pork in per capita consumption. *See id.* 2287-2300.

Rubin v. Coors Brewing Co., 514 U.S. 476, 486-87 (1995) (internal quotation marks omitted).

The record in this case contains no evidence suggesting that a pork nutrition problem exists in this country or that the Pork Act will help alleviate it. Nor does the record show that the Pork Act has a beneficial effect upon the American economy as a whole. Indeed, petitioners cannot even show that the Pork Act benefits the entire pork industry. Although the pork checkoff arguably has helped packers and retailers, petitioners cannot plausibly argue that promotion of specific multinational retailers and processors through checkoff-funded "branded advertising" directly advances the interests of pork producers. USDA statistics show that hog farmers' share of the retail pork dollar declined from 42.5% to 30.1% between 1996 and 2001. U.S. Pet. App. 19a. Thus, the true "free riders" of the pork checkoff are retailers and processors. What is more, since the Pork Act's inception, at least 415,000 hog farmers have quit raising hogs. C.A. App. 1194, 1217. The producers themselves are in the best position to judge whether the pork checkoff has directly advanced their interests. They answered that question with a resounding "no" when 53% of them voted to terminate the entire program. U.S. Pet. App. 17a.

c. The Pork Checkoff Is Far More Extensive Than Necessary to Serve Any Asserted Governmental Interest.

The pork checkoff also burdens First Amendment speech more than necessary to advance the purported governmental interest. If the government's interest in the welfare of the pork industry were truly substantial, the government could use funds from general revenues to fund the same projects. *See Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *30 n.21. Indeed, it has done so in the past. For example, the Small Hog Operation Payment program provided government payments to small- and medium-sized producers based on past production in response to historically low hog prices in 1998

and 1999. *See* 7 C.F.R. § 759.1 (2003). That government-funded program actually did enhance the welfare of pork producers. Here, however, the government has chosen to address these alleged problems by compelling respondents to fund speech with which they disagree. Accordingly, the Pork Act fails even the more lenient *Central Hudson* test.

C. The Injunction Ordered by the District Court and Affirmed by the Sixth Circuit Is the Only Feasible Remedy.

There is no reason for this Court to grant certiorari on the issue of the scope of the injunction ordered by the courts below. The injunction is well supported by the courts' decisions and is the only practicable remedy in this case. The district court's exercise of its traditional authority to grant equitable relief, and the Sixth Circuit's finding that the district court did not abuse its discretion, present no significant issues warranting this Court's review.

The Sixth Circuit held: "Because the Pork Act is nearly identical in purpose, structure, and implementation to the Mushroom Act, the Pork Act is unconstitutional under the analysis set forth in *United Foods*." U.S. Pet. App. 10a. The Sixth Circuit thus held that the entire Pork Act was unconstitutional. Its decision was not "confined to the government's requiring respondents (or their members) to share the costs of the generic advertising and similar promotional activities under the Pork Act," as the United States asserts. U.S. Pet. 22. The Sixth Circuit correctly upheld the injunction's nationwide application, and explicitly and correctly ruled that its decision could not be limited solely to checkoff advertising activities. U.S. Pet. App. 12a-14a.

1. The Injunction Cannot Be Limited to Respondents.

While the general rule is that an injunction should be "no more burdensome than necessary to the defendant to provide complete relief to the plaintiffs," there are no legal limits on

the scope of a federal court's injunction. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This Court in *Yamasaki* upheld a nationwide injunction. *Id.* at 705.

In this case, the injunction could not be limited to respondents. If the Pork Act is unconstitutional for one, it is unconstitutional for all. This Court in *United Foods* ruled the Mushroom Act unconstitutional based solely on the objections of a single producer. 533 U.S. at 408-09. When a regulation or law is found to be invalid, courts must enjoin any further application of that regulation or law. *See, e.g., Dimension Financial Corp. v. Board of Governors of the Fed. Res. Sys.*, 744 F.2d 1402, 1411 (10th Cir. 1984) (enjoining the Board from enforcing or implementing invalid regulations); *Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (rejecting the Department of Labor's argument that nationwide injunction was overly broad and should be limited only to parties where the program was declared unconstitutional); *American Mining Cong. v. U.S. Army Corps of Engineers*, 962 F. Supp. 2, 4-5 (D.D.C. 1997) (rejecting the government's contention that an injunction should be limited to members of plaintiff associations; enjoining application of invalid rule).

As the district court held, it could not limit its injunction only to the parties without rewriting the statute, which it cannot do. *See* U.S. Pet. App. 52a; *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."). The Pork Act does not provide for voluntary assessments or exclusions. Therefore, if the Pork Act violates respondents' First Amendment rights, the only appropriate relief is to strike down the entire Act.

Moreover, a more limited injunction would have been infeasible. Checkoff payments are remitted primarily through third parties who buy hogs from farmers. 7 C.F.R. § 1230.71.

It would not be possible to limit the injunction to only those packers who have dealings with respondents, or to their dealings with respondents only. *Cf. Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (injunction ordering the Secretary of Labor to enforce the Migrant and Seasonal Agricultural Worker Protection Act could not be enforced only against contractors who had dealings with the named plaintiffs, or only as to their dealings with the named plaintiffs).[12]

2. The Injunction Cannot Be Limited to Promotional or Advertising Activities.

When legislation does not contain a severability clause, as the Pork Act does not, a reviewing court "must invalidate the entire statute if the 'balance of the legislation is incapable of functioning independently.'" U.S. Pet. App. 12a-13a (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). In this case, the Sixth Circuit correctly concluded: "The very basis for holding that the Act violates the First Amendment – that its assessment of fees to promote pork is the chief goal of the Act, which does not create a broader regulatory program – prevents us from preserving other parts of the statute." U.S. Pet. App. 13a.

Petitioners have presented no persuasive reason for this Court to disturb or question that conclusion. The stated purpose of the Pork Act is to promote pork. 7 U.S.C. § 4801(b)(1). Even the definitions of "research" and "consumer information" in the Pork Act demonstrate that

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[12] Limiting an injunction to the hog farmer members of respondent CFF and its member organizations would require them to identify themselves, their associational affiliations, and their political beliefs to USDA, private petitioners, and packers. An injunction so structured would have an obvious chilling effect on the exercise of the very First Amendment rights those individuals are trying to vindicate through this lawsuit. *Cf. CFF v. Glickman*, 200 F.3d at 1188-89 (holding farmers' positions on the "controversial issue" of a mandatory checkoff were entitled to privacy protection).

those aspects of the program are also intended to further the promotion of pork. 7 U.S.C. §§ 4802(2), (13).

In any event, the vast majority of checkoff funds continue to be expended on outright promotion. Of the eighty-one percent of the funds that were expended on national programs in 2002 (nineteen percent went to the states for them to spend as they wish for promotion, consumer information, or research), seventy-one percent were spent on promotion activities. National Pork Board, *Pork Checkoff Report*, Vol. 22 No. 1, at 28 (Winter 2003), *available at* http://www.porkboard.org/docs/porkcheckoffQtr12003.pdf. The 2003 Pork Checkoff Report shows that only eight cents of every checkoff dollar was actually spent on "Science & Technology," and makes clear that the purpose of the "research" and "consumer information" components is to further promote pork. *Id.*

Virtually everything funded by the checkoff is speech. That promotion and consumer information constitute speech cannot be questioned. And the research component of the budget, eight percent in 2002, also constitutes speech, since the purpose of doing the research is to publish the results on NPB's website, at www.porkboard.org. *See id.* at 9. As set forth above, respondents have ideological objections to that speech. *See supra* at 6-8, 20.

The entire motivation for the checkoff was the promotion of pork. Enjoining the most fundamental portion of the Pork Act – the promotion portion – while leaving in place the peripheral aspects would fashion a very different program than the one Congress created.[13] The district court had ample

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[13] Petitioners' assertion that *Abood* and *Keller* stand for the proposition that the appropriate remedy for an individual who objects to funding political speech to which he objects is to reduce that individual's assessment misses the crucial underlying point that in *Abood* and *Keller*, *some* of the assessments were found to be germane to a greater statutory scheme or purpose. This Court in *United Foods* ruled that assessments for the promotion of a commodity were germane only to themselves, and thus

basis for exercising its equitable powers in crafting the remedy, as did the Sixth Circuit for affirming the district court. Their decisions raise no questions of exceptional importance warranting this Court's review.

II. This Court Should Deny Certiorari in Both the Present Case and in *Veneman v. LMA*, But If It Grants Certiorari in Either Case, It Should Grant It in Both.

The issues in this litigation have already been fully decided by *United Foods* and by the four recent court of appeals decisions that address and reject petitioners' arguments. But if there is to be further review by this Court, it should be done in a comprehensive way so that USDA can no longer force family farmers to bear the additional costs and burdens of organizing costly legal challenges on a commodity-by-commodity basis. If this Court determines that it is appropriate to grant certiorari in *LMA* or in this case, it should grant certiorari in both cases and set them for oral argument together.

In its briefing of *United Foods*, the United States identified a number of agricultural checkoff programs which it described as virtually identical to the mushroom checkoff, and therefore indicative of the great precedential significance of that case. Since this Court decided *United Foods*, USDA has not applied that precedent to other agricultural checkoff programs, but has instead launched a scorched earth, government speech defense for all of them, even those that it identified as virtually identical to the mushroom checkoff.[14]

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they were unconstitutional. 533 U.S. at 415-16. Without the critical finding of some substantial government interest justifying the compelled association for expressive purposes in the first place, there is nothing for the assessments to be germane to, and therefore nothing to justify any compelled contributions in the first place.

[14] Indeed, since initially lowering the rate of assessment on mushroom growers after this Court's *United Foods* decision, the mushroom board

Hearing these two cases, with their factual variations, would provide the Court with ample evidence on which to make a decision on government speech that would apply to the range of mandatory checkoff programs. There are potentially several permutations of the government speech defense. For example, since mid-2001, the pork checkoff has been administered by NPB, the entity Congress designated to run it, while the National Beef Board has hired the National Cattlemen's Beef Association, a private commodity group not mentioned in the Beef Act, to act as the general contractor for the beef checkoff. *LMA*, 207 F. Supp. 2d at 995. In addition, the record in this case on the issue of whether the government's approval of the speech is "*pro forma*" is extensive and includes, among other things, copies of ads themselves and the corresponding approval documentation. Based on that record, the district court recognized that review by the Agriculture Marketing Services results in edits to only four percent of all ads funded by the pork checkoff. U.S. Pet. App. 42a.

Similarly, with regard to petitioners' challenge to the lower courts' remedy, hearing both cases would provide the Court with a basis for rendering a decision that would apply across the spectrum of mandatory checkoff programs. For example, the Beef Act has a unique legislative history, on which the Eighth Circuit based its conclusion that the non-promotional aspects of the Beef Act are not severable from the promotional aspects and thus the entire program should be enjoined. This case, on the other hand, has a complete record

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increased the assessment to a rate higher than it was before this Court's decision. Agricultural Marketing Services (AMS) News Release, *USDA Approves Mushroom Program Assessment Reduction*, No. 176-01 (Aug. 3, 2001), *at* http://www.ams.usda.gov/news/176-01.htm; *USDA Approves Mushroom Program Assessment Increase*, No. 291-01 (Dec. 4, 2001), *at* http://www.ams.usda.gov/news/291-01.htm; *USDA Approves Mushroom Program Assessment Increase*, No. 281-02 (Nov. 6, 2002), *at* http://www.ams.usda.gov/news/281-02.htm.

of the details of the programs funded by the pork checkoff, demonstrating why the different portions of the Pork Act are not severable and why everything funded by the pork checkoff is objectionable speech. Hearing both cases would allow the Court to render a ruling that would have broad applicability to all mandatory checkoff programs.

Hearing two cases from two different agricultural industries would also provide the Court with the broader backdrop necessary to finally resolve the legal issues raised by petitioners' argument that the case should be governed by the standard set forth in *Central Hudson*. For example, the government advances competing interests to justify the infringement on producers' First Amendment rights in the beef checkoff and the pork checkoff under *Central Hudson*. If the Court were to address the level of constitutional inquiry to be applied to checkoff programs, it should have before it the different interests the government claims are advanced.

This case contains a complete record of the programs funded by the pork checkoff and the objections to each of those programs, showing that the speech is not commercial, but ideological and political. Respondents' objections to the pork checkoff and the programs it funds go to the very core of their values, engendering the "crisis of conscience" discussed by this Court in *Wileman Bros.* 521 U.S. at 472. The record in this case shows that the speech in this case is not just about advertising a product, or promoting a particular brand as opposed to the generic product. The programs and resulting speech generated by the pork checkoff support a system of agriculture that is anathema to those compelled to pay for them. Farming has never been just about commerce; it is a way of life. The polarization of views about the future of agriculture in this country is dramatically illustrated in the hog industry. Respondents believe that farming involves stewardship of the land and fostering healthy and vibrant rural communities.

The United States's request to hold this case – with its clear record on the ideological and political nature of the speech and objections – is another example of the government's litigation tactics of raising and then dropping arguments in order to delay the day when the last checkoff dollar is collected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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BEST AVAILABLE COPY

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No. 03-1180

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v.

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REPLY BRIEF FOR THE PETITIONERS

This case presents the same government speech, commercial speech, and remedial questions as *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164, in the context of a substantially similar agricultural program. As explained in the petition and the reply in *Livestock Marketing*, those questions warrant this Courts review. There is no need, however, for the Court to receive full briefing and hear argument in two cases that present the same fundamental questions. The petition in this case should therefore be held pending the decision in *Livestock Marketing* and then disposed of as appropriate in light of that decision.

Respondents make essentially the same arguments against review as the respondents in *Livestock Marketing*. The government's reply brief in th t case fully responds to those arguments and that discussion will not be repeated here. Instead, this reply will briefly address respondent' principal objections to review and demonstrate why those arguments provide no basis for denying review. The reply also addresses respondents'

alternative contention that, if review is granted in *Livestock Marketing*, it should also be granted in this case.

1. Respondents contend that certiorari should be denied because there is no circuit split on whether generic advertising programs are constitutional under the government speech doctrine. Br. in Opp. 10-11. But the court of appeals in this case, like the court of appeals in *Livestock Marketing*, invalidated an important Act of Congress that has been in operation for more than 15 years. The invalidation of an Act of Congress is itself an independent reason for this Court to grant review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

The government speech question presented in this case and in *Livestock Marketing* is also one of exceptional and recurring importance. In *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001), the Court expressly left open the question whether a generic advertising program can be justified under the government speech doctrine. The resolution of that question will have a direct bearing on the constitutionality of a number of similar federal generic advertising programs. And, as the amicus brief of 30 States and Puerto Rico in *Livestock Marketing* attests, resolution of that issue will also affect the ability of States to adopt similar generic advertising programs. Thus, the question whether generic advertising programs are justified under the government speech doctrine clearly warrants this Court's review.

2. Respondents contend that the government should not be able to obtain a resolution of that important and recurring issue because it did not make a government speech argument in *Glickman* v. *Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997), and did not raise the argument in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), until the case reached this Court. Br. in

Opp. 11. That history has no bearing on the government's ability to raise the issue now. The government presented a government speech defense in the lower courts in both *Livestock Marketing* and this case, and the court of appeals in both cases resolved the issue on the merits, holding that generic advertising programs cannot be justified under the government speech doctrine. Because the question was both raised in, and passed upon by, the court of appeals in *Livestock Marketing* and this case, it is properly presented for this Court's review.

3. Respondents also argue that the government is largely raising a factual issue involving the extent to which the Secretary of Agriculture exercises oversight over generic advertising programs. Br. in Opp. 12; see *id.* at 17. That characterization of the government's position is incorrect. Here, as in *Livestock Marketing*, the government's argument that generic advertising is justified under the government speech doctrine is primarily based on the *legal* characteristics of the program. First, Congress itself has specified the content of the message to be conveyed under the Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. 4801 *et seq.*—that it is desirable to eat pork. 7 U.S.C. 4802(12) (defining "promotion" to mean action, including advertising, "present[ing] a favorable image for porcine animals, pork, or pork products to the public"). Second, Congress has selected that message in order to further important governmental purposes—to promote adequate nutrition and the national economy. 7 U.S.C. 4801(a)(3) and (4). Third, Congress has established an entity whose members are selected by the Secretary of Agriculture (the Pork Board) to help carry out some of the administrative responsibilities under the Act. 7 U.S.C. 4808. And fourth, Congress has en-

trusted the Secretary with the ultimate responsibility to ensure that Pork Act advertising campaigns advance the government's message and further governmental objectives. 7 U.S.C. 4808 (b)(1)(A), 4808(b)(2) (approval authority). Whatever the precise contours of the government speech doctrine, and regardless of the precise level of involvement of the Secretary of Agriculture in selecting particular advertising messages, those features in combination are more than sufficient to make Pork Act speech government speech as a matter of law.

4. Respondents alternatively contend that, if the Court grants certiorari in *Livestock Marketing*, it should also grant certiorari in this case. Br. in Opp. 12. Respondents claim that this Court should grant plenary review in both cases because the government "has not applied *[United Foods]* to other agricultural checkoff programs, but has instead launched a scorched earth government speech defense for all of them." *Id.* at 27. Respondents also assert that the government recommended that this Court hold this case pending the decision in *Livestock Marketing* "in order to delay the day when the last checkoff dollar is collected." *Id.* at 30. That assertion is groundless.

The Court in *United Foods* expressly left open the question whether generic advertising programs could be justified under the government speech doctrine. In the wake of that decision, the government's defense of generic advertising programs as permissible government speech did not reflect the failure to apply a controlling precedent of this Court; it reflected the fulfillment of the government's solemn duty to defend Acts of Congress. Nor did the government recommend that the petition in this case be held in order to delay the end of the Pork program. The government recommended that the Court hold this case pending the

decision in *Livestock Marketing* because the two cases present the same fundamental questions—whether generic advertising of agricultural products is permissible government speech, whether such generic advertising programs are constitutional when they satisfy the standards applicable to the regulation of commercial speech, and whether enjoining collections from those who do not object to assessments and for activities other than generic advertising is, in any event, an excessive remedy. It is the government's considered judgment that the Court would not be materially assisted by receiving two full rounds of briefing on those questions, or from hearing separate arguments concerning the two cases. Instead, as is customary when two cases raise the same basic issues, the Court should give plenary consideration to one of the cases and hold the other. And because the two cases present the same fundamental questions, the Court's decision in *Livestock Marketing* will presumably control—not delay—the disposition in this case.

* * * * *

For the foregoing reasons as well as those in the petition, the petition in this case should be held pending the decision in *Livestock Marketing* and then disposed of as appropriate in light of that decision. In the event that the Court concludes that it would benefit from briefing and argument in both cases, it should grant the petition in this case as well as in *Livestock Marketing* and consolidate the two cases for oral argument.

Respectfully submitted.

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MAY 2004